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THE EFFECT OF WAR ON PRIVATE LAW TREATIES

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I

What is the effect of war on private law treaties or, better stated, on private rights deriving from treaties? This is a question which often arises in international affairs and which up to now has not been adequately clarified. Its solution, which pertains to international law, is most often determined by the judge of a municipal court who deals with it much more from the point of view of its practical consequences than from that of underlying principles; for the most part he remains unaware that his own attitude in the matter must in fact depend on, and only on, the attitude of his own government. Publicists as well as judges freely admit that the question is a delicate one, still without perceiving perhaps the extent to which this is true. The importance of the question is to some extent diminished by the fact that it is increasingly the practice, when hostilities have ceased, to re-examine the present and future fate of those treaties which were binding on the belligerents when they began. But even a settlement effected on these lines brings retrospective difficulties into being, upon which the prevailing social and political atmosphere is not without influence. When, however, quite suddenly and almost on the

same day, two divisions of the highest French court, that is to say, two Chambers of the Cour de Cassation, give contradictory decisions, it is clear that the problem stands in urgent need of close inquiry.

For its solution, following the order of authoritative sources of law laid down in Article 38 of the Statute of the International Court of Justice, we may have regard to three such : governmental policy, judicial decisions and doctrinal analysis.

First, what is the answer given by the controllers of policy, that is to say the diplomats? Vattel, who was one of their number, is quite categorical : ' Conventions and treaties made with a nation are annulled and rendered invalid by a war between the contracting parties, either for the reason that these treaties depend impliedly on the continuance of a state of peace, or for the reason that either belligerent, being entitled to deprive his enemy of his property, withdraws from him the rights previously granted under treaty '. But the claim to deprive the enemy of his rights needed the support of a declaration of intention. It therefore became the custom to issue a proclamation of deprivation. As customary law this principle was already clear at the time of the Thirty Years War and it soon became the practice on the outbreak of war to consider all treaties as generally and, indeed, automatically revoked. This rule was affirmed by the statesmen of the time. Lord Bathurst, for example, expressed the view to John Adams that ' Great Britain knows no exception to the rule whereby treaties are automatically rescinded by a war subsequently breaking out between the parties '. Sir John Harding, the Queen's Advocate-General, affirmed on January 13, 1854: ' According to the law of nations war abrogates *all* treaties between the belligerents '. To make doubly sure, it became customary for the opening of hostilities to be accompanied by a declaration of revocation of all treaties. Thus the eighteenth century came to a close with a declaration by the Government of the French Convention (March 15, 1793) revoking *all* treaties between the old Monarchy and the Powers then at war with the Republic. At the end of the nineteenth century Spain similarly (April 24, 1898) declared null and void her treaties of peace and friendship and *all other* agreements with the United States.

The total and absolute extinction without exception or qualification of all treaties—that is the instinctive attitude of governments throughout history to our problem. In recent times we have the example of the revocation by Germany in 1914 of her treaties with France and the Allies, and in diplomatic practice the

attitude of Robert Lansing, Secretary of State under President Wilson.

Secondly, what is the attitude of the judge who, having the care of private interests, might be expected to show greater solicitude for them?

At the time of the Thirty Years War the attitude of the judge was identical with that of the political authority and even as late as the eighteenth century it had not shown itself truly independent. The Treaty of Utrecht of 1713 by Article 13 relieved British subjects in France from their incapacity in succession to estates. War was declared with England in March, 1744. On March 15, 1757, the *Parlement* of Paris held that the Englishman Morgan was incapable of succeeding to the movable estate of his sister who had died in France. The Declaration of Rights of 1789 led to the abolition of the *aubaine* (the right whereby the sovereign authority succeeded to the estate of a non-naturalised foreigner). When its enforcement was again attempted, the judges held that in spite of the Decree of the Government of the Convention of 1793 revoking all treaties, nevertheless, those that had abolished the *aubaine* were to be considered to that extent still in force. As guardian of the private interests of man, the judge was motivated by the feeling that among the rights granted to aliens by virtue of international conventions there were some which in fact, partaking of the nature of man, were not so much granted as declared. When the Code Napoleon made the alien, in the absence of a contrary diplomatic convention, incapable of succession to French estates, the Court of Turin, which at the time was French (January 10, 1810), expressing its view on the Franco-Sardinian treaty of March 24, 1760, and a little later, the Cour de Cassation (on June 15, 1815, pronouncing on the Franco-Russian treaty), both declared that a treaty relieving an alien from incapacity in succession must continue in force and could not be revoked by war. Belgian decisions followed the French on this point, taking inspiration from the theory of J. J. Rousseau that war is a relationship between States and not individuals, and considering war to suspend though not to annul private rights depending upon treaty. A Brussels decision of June 30, 1838, declared, 'if it is true that treaties are suspended during war this can only be the case as between governments or nations and not as between private individuals. These are not at war and their private rights cannot be held to depend upon war's uncertain hazards. So long as one of the belligerent States has not by express and formal declaration called back into existence within its territory these inhibitions of an earlier, ignorant and barbaric age, incapacities

removed by treaty cannot of themselves revive'. It is clear how greatly the Belgian court was impressed by the inhuman character of the *aubaine*.

The same notion can be found underlying a large number of American decisions. By a survival from feudal practice, the right to real property and to succession to estates was withheld from aliens in the United States just as in England. After the Declaration of Independence it seemed indeed a severe measure to continue to insist on such incapacity as between Americans and British. Was it possible to refuse such rights to descendants of men of the same blood, henceforward separated in two distinct political orders? A remedy was provided in the treaty bearing his name negotiated by the great judge John Jay between the United States and Great Britain in 1794, by Article 9 of which British subjects and American citizens were given relief from such a rigorous principle. War intervened, albeit brief and without depth of motive or bitterness (1812–1814). Were brothers, for the time being enemies, thereby once more to lose rights recently restored by treaty, having been previously lost as a result of the Declaration of Independence? The judge was hesitant, seeking a way out. He found that the Declaration of Independence preceded the treaty of 1783, which established its consequences and laid down rights to territory and frontiers in such manner that once determined they were irrevocably acquired—since it would clearly be inadmissible to hold that any supervening war could reopen the question of the existence of the United States. Thence it followed that there must be treaties which, once adhered to, remained in force (except in the case that peace rendered them of no effect). Amongst such are those acknowledging a State's right to its territory, and, by extension, the right of private individuals to the real property of which this territory is composed. The problem was not one of the acquisition of title either after or during a war, but of preventing a war bringing about a loss of title. Here was a most favourable basis on which to proceed, namely, that of the preservation of acquired rights. In the case of *Society for the Propagation of the Gospel* v. *New Haven*, 8 Wheat. 464, 493; 5 L.Ed. 662 (1823), Judge Washington held: 'If real estate be purchased or secured under a treaty it would be most mischievous to admit that the extinguishment of the treaty extinguished the right to such an estate. In truth, it no more affects such rights than the repeal of a municipal law affects rights acquired under it'. Similarly, in an English decision (*Sutton* v. *Sutton*, Court of Chancery (1830) 1 Russ. & M. 663) the

Master of the Rolls decided that 'the heirs and assigns of every American who held lands in Great Britain at the time mentioned in the Act of 37 Geo. 3 (implementing the treaty) are as far as regards those lands, to be treated, not as aliens but as native subjects'. Not only are earlier acquisitions confirmed—respect for acquired rights is sufficient for that—but a permanent reciprocal right to property in the fullest sense of the word was affirmed, so that as between a British subject and an American citizen, no discrimination was possible in respect of priority to rights of property. On close examination it is clear that the American decisions were not intended to do more than preserve rights antecedent to the treaty, but basically there was nothing to prevent an easy passage from respect for present rights to a recognition of rights to be acquired after the war. Once recognised these rights were permanent and indefeasible. American legal opinion could not, and would not, have distinguished in this respect between rights preserved in favour of a ceded population in the case of annexation and rights granted by virtue of international treaties to those who, friends today, may become enemies tomorrow. In both categories American juridical opinion held the view of the great Judge Marshall when, referring to the cession of Lousiana, he said 'in the treaty . . . the United States stipulated *that the inhabitants of the ceded territory should be protected in the free enjoyment of their property*. The United States, as a just nation, *regard this stipulation as the avowal of a principle which would have been held equally sacred, though it had not been inserted in the contract*': *United States* v. *Soulard* (1830) 4 Peters Reports 511. Based as it is on cases in which conventional international law corresponds to a feeling of human obligation, this judicial point of view which causes the right to survive beyond the lifetime of the treaty acknowledging its existence, gives the erroneous impression that it is the treaty itself whose existence is prolonged. The judicial decisions carry over to the treaty the survival which, if they dared, they would prefer to confer upon the right detached from the treaty. In this process it is not merely the right of owning real property or succeeding to an estate or the right of free movement which is recognised but other private rights less directly essential to the human person which little by little are involved.

In fact, once the courts had begun to progress, by the recognition of the right to real property and the right to succession, along the avenue of private law, other rights of similar character became recognised. For example, the private law treaty of March 24, 1760, between France and Sardinia (later Italy) was in

no way affected by the wars of the Revolution and the Empire; not merely did the relief from incapacity embodied in the treaty survive the war but other private rights did likewise (Aix: *Isnard Blanc* v. *Pezzalès S.* 1859.2.606). In Italy, similarly, recognition of private rights went far beyond that of succession to property, to embrace all other private rights embodied in the same convention of 1760 : registration of a mortgage without *exequatur*, right of Italian women and infants to effect legal mortgage in France, dispensation from giving security for costs and judgment debt (Court of Turin March 20, 1876, Clunet 1876, p. 244; Court of Turin May 15, 1865; Giurisprudenza 1865, p. 240; Florence June 20, 1870). Similarly, a French decision declared, ' whereas it is beyond doubt that war and conquest terminate political treaties, it is held that treaties concerned with private or judicial interests not incompatible with a state of war are thereby merely suspended (*Bucci* v. *Hospices de Saint-Quentin*, Tribunal de Saint-Quentin October 30, 1885, Clunet 1888, p. 99). This decision is so akin to those of American courts that in American textbooks it appears side by side with *Sutton* v. *Sutton* with this note ' Great Britain appears to hold that treaties in general are abrogated, whereas the United States maintain that they are only suspended, by war ' (Scott and Jaeger, *Cases on International Law*, 2nd ed., p. 580). But whether suspended or retained in force, in any event they are not annulled, and at the same time the distinction applied as between certain private rights and the remainder of the treaty is now applied to all. In the result, all private rights are preserved, all others are abrogated.

In this way and as a result of the development of the idea common to two systems of law, Anglo-Saxon and Latin, an extension is effected from those rights which cannot be refused, because inherent in the nature of man, to others, akin to these, embodied in the same treaty. Predisposed as he is in private cases to take into account the natural rights of man, the judge feels himself under an obligation to explain the exception he is thereby making to the rule previously accepted whereby all treaties were annulled. He does this on the basis of a general principle derived, not from the nature of the rights themselves, but from the nature of treaties. Having recognised the social usefulness of the check on universal abrogation and not daring as yet to found this exception on the nature of any particular right, he is led to justify the exception by the division of treaties into two categories, political and private. What is to be the criterion for this distinction? The treaty itself may contain its own self-definition. If it is silent on the point,

the tacit intention of the parties will decide. But an investigation of this sort is perilously subjective. An automatic objective criterion would be preferable. The French and the American judge found this in incompatibility: *Cessante causa, cessat effectus.* Incompatibility brings the cause to an end and with it the effect. The judge, by extending the sphere of rights which must be acknowledged to every man, even an enemy (true human rights which the treaty acknowledges rather than grants), and by taking the treaty as a whole, attaches to these human rights the other private rights which accompany them in the treaty.

Thus, as we see, on the basis of an analysis of the intention of the parties—a subjective criterion for which there is later substituted the more general and more certain objective criterion of incompatibility—an exception to the rule that all treaties are revoked by war became firmly established. By 1890 there was no longer any doubt on this.

What do the publicists say? Starting from the point of view of total revocation which was that of the political authority, they now favour the view evolved by judicial decision as we have examined it. At the end of the eighteenth century and the beginning of the nineteenth, publicists were the close allies of the diplomats and had no hesitation in agreeing that treaties come to an end when war breaks out: thus wrote Mably, *Public Law of Europe*, 1747; thus Vattel (1759, Book 3, § 175): 'Conventions and treaties made with a nation are annulled and rendered invalid by a war between the contracting parties either for the reason that these treaties depend impliedly on a continuance of a state of peace, or for the reason that either belligerent, being entitled to deprive his enemy of his property, withdraws from him the rights previously granted him under the treaty'. G. F. de Martens, *Droit des gens moderne de l'Europe* (4th ed., 1820, § 58) and Phillimore, *International Law* (Vol. 3, 2nd ed., 1873, p. 792 *et seq.*) are of the same opinion. But as the trend of judicial decision developed, publicists did not remain indifferent. Increasingly numerous exceptions to the rule of abrogation of treaties were added to their lists. First among them, of course, were private rights: Oppenheim, *International Law* (§ 99); Hall, *International Law* (§§ 398–401); Westlake, *International Law* (Vol. 2, p. 34). Very soon the formula developed by judicial decision, that only treaties incompatible with the state of war were annulled, found its way into the writings of the publicists, without any qualification as to whether this was by way of exception or by direct application of a superior principle. Subsequently, the idea

that the validity of treaties does not necessarily depend on the continuance of a state of peace and does not automatically cease when war breaks out between contracting States, that in fact the efficacy of these treaties is only lost in time of war when their execution is incompatible with war itself, makes its appearance in the writings of authors remarkable for their wide human sympathies: Bluntschli, *Droit International codifié*, translated by Lardy (Arts. 461 and 538); Fiore, *Droit International codifié*, translated by Antoine (Art. 1438).

The views of publicists soon received a wider development. In his report to the Institute of International Law on the effect of war on treaties, Nicolas Politis, without trying, as far as private rights were concerned, to go beyond the point reached by judicial decision, sought, nevertheless, a complete reversal of the earlier principle in regard to the treaties themselves, so that abrogation, rather than being the rule, should be the exception. The Institute adopted this proposal, declaring in its first article: 'the opening and conduct of hostilities remain without effect on the existence of treaties, conventions and agreements, whatever their title and object'. Article 2 enumerates the exceptions to this general principle. Until then it was possible to offer as a basis for the attenuations of the general principle effected by judicial decisions, the idea advanced in the first place by Rousseau, and later by Portalis in the Prize Court, that war is a relationship between States and cannot affect relations between individuals. From now on the Institute of International Law based the liberal view on another idea, on the much broader idea of Montesquieu, that in war nations are under an obligation to do as little harm as possible to each other, just as in peace they are obliged to do the greatest good. 'The rule that treaties continue in force', says Politis in his report, 'appears as the corollary of the modern conception of war which, itself an increasingly exceptional phenomenon, can produce only limited results. The international order in which the belligerents were living is not swept aside. It is only provisionally modified in the small measure necessary to the achievement of the war aim, that is to say the victory of the stronger. Beyond that point ordinary legality continues to exist together with rules deriving from custom and those, increasingly numerous, laid down by treaty. To retain the old principle of the abrogation of treaties as the necessary effect of war would be to run counter to the tendencies of our age'. (*Annuaire of the Institute of International Law*, 1911, Vol. 24, pp. 201–2, 207–8 and Vol. 28, pp. 648–50.)

II

The period of The Hague Conferences (1899–1907) was a favourable one for this development of judicial decision and doctrine. The burden of maintaining armaments in peacetime had grown lighter, the rules of war in terms of humanity had become more precise. The distinction in the effect of treaties according as to whether they were private or political seemed at first sight a sufficiently clear principle. The disappointments which followed during the First World War, replaced though they were by the aspirations inspired by the League of Nations, destroyed the great hopes that had been raised at The Hague both in the doctrine of the publicists (as witness such masterly studies as Sir Arnold McNair's *Law of Treaties* and his 1937 series of lectures at The Hague Academy of International Law) and in the decisions of the courts. These, which had originally been the mainspring of the doctrinal development, as we have already observed, now tended to rest at the point reached when The Hague Conferences were initiated. By unconscious and continued growth the rulings of the courts passed from the mere maintenance of acquired rights to that of rights capable of acquisition but not yet acquired, resting all the time on principles which the courts themselves had created: intention, absence of incompatibility, distinction between private and political. Where formerly the courts had deplored the absence of law, they could now invoke the resolution of Christiania, idealistic, even futuristic, though this might be called by some. Not so Judge Cardozo, who declared it to be reliable authority in a judgment of the Court of New York which was confirmed by the Supreme Court of the United States (to which in the meantime he had been raised) (*Techt* v. *Hughes*, 1921 U.S. 643). Could an Austrian resident in the United States succeed to real property in New York by virtue of the Austro-American Treaty of Commerce and Navigation of August 27, 1829, as renewed by the Convention of May 8, 1848, after war had broken out between the United States and Austria-Hungary? Judge Cardozo declared: 'I find nothing incompatible with the policy of the government, the security of the State and the prosecution of the war. We do not confiscate the property of an alien within our frontiers. If we allow him to remain here he is free during good conduct both to buy and sell property . . . a government policy which is not contravened by such a purpose is even less contravened by succession to property'. This decision, given after the First World War, was followed by the Supreme Court of Kansas: *State of Kansas* v. *Reardon* (*Annual Digest*, 1926, No. 332) in applying

the provisions of a treaty of 1828 between Prussia and the United States. A similar solution, again on the question of succession, was arrived at by the Supreme Court of Nebraska. Judge Good declared: 'The right of succession to real property that is conferred by treaties is compatible with the state of war and is not nullified by such state of war'.

It is thus clear that the First World War did not in the least affect the attitude of the American courts to this question. Nor did the Second World War; the ruling of the court was still in complete harmony with the doctrine of the publicists. Alvina Wagner, resident in California, died in 1942 possessed of both movable and immovable property in that State. By a will dated December 23, 1941, she left all her property to four relatives of German nationality domiciled in Germany. Six residents in California claiming legal right to the succession sought to have this gift set aside. Article 4 of the U.S. Treaty of Friendship, Commerce and Consular Rights with Germany, dated December 8, 1923, promulgated October 14, 1925, indubitably applied to German successors and its provisions ought to prevail over those of the law of California when these were in conflict therewith. In *Clark* v. *Allen*, 33 U.S. 503, on June 9, 1947, the Supreme Court decided: 'President and Senate may denounce the Treaty and thus terminate its life. Congress may enact an inconsistent rule, which will control the action of the courts (*Fong Yue Ting* v. *United States*, 149 U.S. 698). The Treaty of Peace itself may set up a new relation, and terminate earlier compacts either tacitly or expressly . . . but until some one of these things are done, until some one of these events occurs, while war is still flagrant, and the will of the political governments unrevealed, the courts, as I view their function, play a humbler and more cautious part. It is not for them to denounce treaties generally, en bloc. Their part is, as one provision or another is involved in some act or controversy before them, to determine whether, alone, or by force of connection with an inseparable scheme, the provision is inconsistent with the policy or safety of the nation in the emergency of war, and hence presumably intended to be limited to times of peace. The mere fact that other portions of the treaty are suspended or even abrogated is not conclusive. The treaty does not fall in its entirety unless it has the character of an indivisible act'. (229 N.Y. pp. 242–3.)

Other decisions followed in the same sense, *e.g.*, *Hanafin* v. *McCarthy*, 57 Atl. (2d) 148, Supreme Court of New Hampshire, February 3, 1948. Uren, 'The Succession of the Irish Free State',

28 Mich.L.Rev. 149; 48 C.J.S. International Law 15, should also be noted. Thus through two world wars, without any loss in continuity, American courts adhered firmly to the principle accepted earlier. What was happening in the courts of other countries during the same period?

At the time of the First World War, there was a certain hesitancy. The French courts, considering that the Treaty of Versailles had by a special Article in regard to Germany (as had the other peace treaties in regard to Germany's allies) envisaged the restoring into force of the whole body of treaties, pronounced private international law conventions to be abrogated by war. (Treaty of Versailles, Art. 289, St. Germain, Art. 241, Neuilly, Art. 168, Trianon . . . .)

On July 29, 1925, the Court of Colmar in deciding a case between a Czechoslovak commercial company as plaintiff and a French defendant, which turned on the question whether Art. 17 of The Hague Convention regarding dispensation from the guarantee of *judicatum solvi* could be successfully invoked by the plaintiff held that 'this Convention, so far as concerns relationships between French and Austro-Hungarian nationals, must be considered suspended by the war and only capable of being restored to force by a formal clause of a new treaty effective in respect of recently created relationships'. (Cf. 11–12 *Revue de Droit International*, Darras-Lapradelle, 1915–16, p. 5; Tobin, *The Termination of Multipartite Treaties*, 1933, p. 116.) With an additional shift of emphasis from suspension to abrogation (Lyons, October 13, 1931, Loewengard, Clunet 1923, p. 391) the decisions of the French courts were in harmony with those of Italy and Germany (Italy, Cass. January 26, 1929, Società Walter Kiada, *Rivista di Diritto Internazionale*, 1929, pp. 418–420; Germany, Supreme Court of Leipzig, May 23, 1925, *Zeitschrift für Internationales Recht*, 1926, 408.)

Only American decisions preserved their continuity. At the same time, while keeping strictly to the elementary human rights of property and succession, they retained, within the general formula and the constant criterion of compatibility, the possibility of further extension.

Following the outbreak of the Second World War in 1939, it was surprisingly enough a series of decisions given by the French courts which operated this extension, beyond even those rights included in the Franco-Sardinian Treaty of 1760. The common characteristic of these decisions was their upholding in favour of Italian subjects of the continuity of private rights deriving from

treaties, even where these rights appeared no longer as general human rights inherent in the nature of man, but thoroughgoing civil rights, rights that were unusual, rights to particular favour or privilege, which for that very reason might seem in the absence of exceptional concession to be reserved to French nationals. In a few years a body of case law in matters of civil and commercial leases was formed, not perhaps without a certain resistance on the part of courts of inferior jurisdiction, but with undeterred consistency on the part of the Supreme Court. In 1853, the Cour de Cassation, Criminal Chamber, expressed itself unequivocally for the abrogation by war of commercial treaties. Now, in questions of commercial, civil and rural leases, the Cour de Cassation, Social Chamber, found no hesitation in accepting the principle that treaties survived the opening of hostilities. Although Parity Tribunals [1] and Agricultural Tribunals tended to resist the principle and judges of first instance did not seek to hide their lack of enthusiasm in giving to Italians the same rights as to Frenchmen by virtue of the Convention on Establishments signed at Rome on June 3, 1930, the Social Chamber of the Cour de Cassation overruled them: 'Treaties concluded between States subsequently becoming enemy belligerents are not necessarily suspended by the declaration of war; in particular, pure private law conventions not requiring any dealings between enemy Powers as such and having no connection with the conduct of hostilities . . . are not, by the sole reason of war, suspended as to their effects'. On six occasions in various types of case—civil leases, rural leases, commercial property—the Social Chamber of the Cour de Cassation re-affirmed this standpoint (November 5, 1943, *Bussi* v. *Menetti*; April 21, 1944, *Poet* v. *Deleuil*; July 25, 1946, *Hutard* v. *Margerit*; March 21, 1947, *Juidi* v. *Fassin*; May 20, 1947, *Pinna* v. *Crépillon*; February 13, 1948, *Amadio* v. *Diduant*). But when quite suddenly the same question came before the Civil Chamber on February 10, 1948, on appeal from a decision of the Court of Aix (*Artel* v. *Seymand*), the Cour de Cassation in this instance decided the case in a directly contrary sense, albeit reserving its opinion on the question whether the effect of war is to suspend or abrogate treaties.

[1] The *tribunaux paritaires agricoles* were the creation of the Vichy Government, by a law of 4th September, 1943. This was confirmed by an order of 4th December, 1946. A *tribunal paritaire* sits in the chief town of each *canton*, presided over by the *Juge de Paix* and comprising also assessors elected as to half their number from among landed proprietors, and as to the other half from among farmers and *métayers*. These tribunals are competent in respect of all disputes between lessors and farmers occasioned by rural leases. Appeal lies to the *tribunal paritaire* of the *arrondissement*, presided over by the President of the Civil Tribunal.—Ed.

The contradiction between the two Chambers of the Cour de Cassation is all the more marked in that the decisions were given at the same period of time, concerned the interpretation of the same text, and were applicable to the same persons, namely, Italians.

Quite apart from the problem of the survival of treaties, however, there exists another, equally important. There is perhaps between the two Chambers, Civil and Social, of the Cour de Cassation, a difference in trend of opinion in regard to privileges. A strong current of reform has been noticeable in French law for many years, and, property having become more and more a social function, the old law of property has lost some of its vitality. When, however, the benefit of these reforms is claimed by foreign immigrants with the support, sometimes regarded as ill considered, of the French Ministry of Foreign Affairs, there are many who hold such benefit much too far-reaching to be accorded to aliens, particularly enemy.

The new rural law in France offers to both land-owning farmers and to those who lease the land they farm (*métayers*) a certain number of privileges which operate in limitation of rights of property. These have been very freely granted by the law, as a result of favourable interpretations by the courts, to aliens, in particular to Belgians, Swiss, Poles and Italians. So-called Parity Tribunals are entrusted with a special jurisdiction in regard to these matters, and they are without doubt little disposed to admit in favour of either category of farmer the application of the new rules relating to rural leases. There are thus two opposing tendencies. On the one hand, the national society, formerly free to all, is becoming an increasingly closed society, refusing a steadily growing number of rights to aliens, as for example, those relating to prisoners of war or to material damage or bodily injuries resulting from war. These rights make such exorbitant inroads that the Legislature hesitates to grant them to aliens, who in many instances are former enemy subjects. Against this tendency, however, there operate the imperious demands made by French agriculture for foreign labour. Governmental policy is favourable to immigration and agreements are entered into to promote it, such as for instance the Convention of May 17, 1945, published by a Decree of August 24, 1947, relative to the establishment of Italian subjects in France.

It is against this background that the discrepancy between the two Chambers we have noted has arisen. For a correct understanding of the attitude of the Social Chamber of the Cour de Cassation in the mid-twentieth century it is useful to compare the

decisions of French, English and American courts at the beginning of the nineteenth century. The new rights which are granted to French subjects (in connection with leasehold houses and buildings, the right of extension exercisable by the lessee, or of re-entry exercisable by the landlord; in connection with farming leases the right of extension, conversion to freehold, or pre-emption, exercisable by the tenant) and which, thanks to the liberal interpretations of the Ministry of Foreign Affairs, are made widely applicable to aliens as well, represent but the beginning of a common social legislation which by the operation of treaties is acquiring more and more importance in the common law. Once recognised in a treaty these rights acquire the force of an avowal by the juridical conscience of two nations of the natural regime appropriate to the international rights of man. The treaty is thus merely the occasion, reciprocity a precaution, friendship a circumstance, for affirming a right which once established endures by its own strength and its profound social validity. One might almost say that we are witnessing less the effect of war on treaties than an effect of war on rights. There are some rights which war manifestly cannot touch. They have been established too long. There are others, particularly in the sphere of labour relations, which gradually advance from being an exception provided for by convention to full legal stature. This is the explanation why the American courts continued without a break to uphold private law treaties in order to retain within the legal framework of the different States the recognition of essential rights such as those relating to real property and family succession. It is in the same way that the legal instinct is at work in the decisions of the Social Chamber of the Cour de Cassation. Any other solution would be out of harmony with the dynamic evolutionary progress of international law. A comparison of the decisions of the French Social Chamber with those of American courts reveals a certain similarity of surrounding circumstances which enables us to understand and so to justify them in the international sphere. In conferring on Italian farmers in France the same rights as upon Frenchmen, the law is, of course, not concerned with a natural right in the sense of the old-time Declaration of the Rights of Man, or an individual right, or a right to property, but with a much more broadly based social justice. In granting this to the alien the convention is in the very vanguard of progress. By being inscribed in the treaty this moral undertaking is transformed into a legal duty and thus comes to occupy a permanent place in international relationships. Once recognised, it is so not for a limited time but once and for all. So it was with the right to

succession, which when recognised by treaty survived the treaty itself. The same is true in our social, economic and rural law of the right to renewal of leases and similar rights. Just as the abolition of the right of *aubaine* was incorporated in a treaty before forming part of the general body of law, so the economic rehabilitation of the agricultural labourer, when an alien, must first be on the footing of parity with the labourer of French nationality by privilege of treaty, before it can be sanctioned on the basis of general law without recourse even to the principle of reciprocity. It is unnecessary to look for any other reasons, to be drawn for example from the special position of Italians in France, to explain and justify this attitude of the courts. (*E.g.*, reasons of national sympathy, their number, or the value to the French worker of the principle of parity in working conditions, shielding French proprietors from the temptation to seek Italian rather than French labour.) Once justified, it is finally determined by a recourse to the basic reason influencing the American courts : Is there any incompatibility between upholding the rights deriving from the treaty and war? So important is this criterion that the Civil Chamber of the Cour de Cassation was at pains to insist on the incompatibility with war of the right deriving from treaty. The Civil Chamber was facing a different problem from that confronting the Social Chamber, the question whether the rights enjoyed by Italian proprietors and lessees in France in peacetime should be preserved during war. Here the concern is not with a rural statute benefiting the less privileged of the contracting parties in an unequal contract, but with an urban statute of equal benefit both to lessee and proprietor. But even here, though the matter appears to be one of privilege, what is at stake is the broad human function of the law. Once the decision of the Social Chamber is held to be justified, the possibility cannot be conceded that the Civil Chamber in any application whatever of the convention could run counter to it on the ground of incompatibility, for such incompatibility in this case is purely sentimental, partaking of phobia against the enemy and giving to the decision of the Civil Chamber a partisan appearance and a consequent instability.

III

Above and beyond all these divergences and hesitations resulting from the absence of a stable doctrine lies the real difficulty, which is that too often problems of this kind come before the judge without having previously confronted the government. In earlier law war was a cause of abrogation of all treaties and the practice was

for a State on declaring war to proceed to a solemn and expressed denunciation of them. 'Formerly', says Phillimore (*loc. cit.*), 'it was customary amongst nations for the belligerents to make a public and solemn proclamation on the outbreak of war declaring that they were no longer bound by their obligations under treaties' (Leibnitz, *Praefatio ad Codicem diplomaticum Juris Gentium*). This custom became outmoded. As the opening of hostilities was automatically followed by a proclamation, this came to be regarded as unnecessary and war was considered of itself to bring about the abrogation of treaties between the belligerents. At the present day the situation has changed, since some treaties remain in force and others are abrogated. Thus a declaration on the part of governments has a usefulness which it has not had since the time of Leibnitz. The position, however, in modern times is that treaties remain in force (or at any rate private law treaties in favour of which there is at least a presumption of survival) unless denounced. This possibility of discrimination between treaties at the outbreak of war has its counterpart in the possibility that the victorious Power enjoys when hostilities are over, of declaring the revival of those abrogated treaties from which it seeks to draw benefit, or the continuance in force of those non-abrogated treaties whose prolongation it desires. This principle is well illustrated by Art. 44 of the treaty with Italy of February 10, 1947: 'Each Allied or Associated Power will notify Italy, within a period of six months from the coming into force of the present treaty, which of its pre-war bilateral *treaties* with Italy *it desires to keep in force or revive*'. It is clear that the effect of the decision of the Social Chamber of February 10, 1947, is to bring about the survival if not of all, at least of most, or at any rate certain parts of, those private law treaties the prolongation of whose existence as from the end of hostilities had been possible since their outbreak. It follows also that the only function of a declaration in regard to treaties at the outbreak of war is in respect of those it is intended to abrogate. The others remain in force.

The government alone is in a position to declare which treaties are to be abrogated, and this by an express indication of which and which particular treaty or which particular part in a given treaty. Any attempt to lay upon the judge the responsibility for deciding which treaties are abrogated and which remain in force is futile, though there are not lacking arguments in support of this view. It may be advanced that the judge is the natural guardian of private interests and that the retention or otherwise of the treaty is important precisely because of its effect on private interests;

alternatively it may be argued that the retention or otherwise of the treaty is a matter of the intention of the parties, that is to say it is a matter of interpretation (Cecil Hurst, ' The Effect of War on Treaties ', *British Year Book of International Law*, 1921–22, p. 40; Judge Cardozo, *Techt* v. *Hughes*, *supra*), and that in accordance with tradition, especially French tradition, it is for the judge, whenever private rights are in issue, to interpret treaties by the same standards as he would interpret a private contract (Chailley, *Nature juridique des traités internationaux suivant le droit contemporain*, Paris, 1932; La Pradelle-Niboyet, *Répertoire de droit international*, *Supplément*, 1934, No. 259 *et seq*). As against these arguments, however, it must be remembered that the denunciation of treaties following the outbreak of hostilities is an element, indeed an instrument, of war itself, and as such is the responsibility of the government and not of the judge; furthermore the executive may have an interest in pursuit of its wartime policy in dealing lightly with its adversary, or in favouring the enemy population with a view to securing its disaffection from its own government, hence in upholding, even during war, pre-war rights of enemy subjects. (Alberic Rolin at the Christiania Conference of the Institute of International Law pertinently remarked that: ' There is no justification for declaring conventions previously concluded between belligerents, abrogated as of right, since it may well be the case that it is in their interest to maintain them in force and it would be an excessive measure to attempt to prevent them from doing so '.) In brief, war is no more than a circumstance which in certain cases, to be determined by international law, opens up the possibility of denunciation of treaties. The determination of when this circumstance exists is a question of international law. Part of the complexity of our problem is that it falls to be decided in the main by judges of municipal courts in matters which moreover are often, as we have seen, regulated in the last analysis by executive decision.

IV

The problem of the effect of war on private law treaties may thus be divided into the following three principal questions:—

(1) Does international law allow the denunciation of treaties?
(2) Is it the intention of the government to exercise this right, or, as it may do if it so prefer, to renounce it?
(3) Where the government has not indicated its intention, can the judge of a municipal court decide the issue?

No one but the international judge can decide the first question. A reference to the writings of the publicists and to international

arbitral decisions reveals considerable hesitancy. The Hague Permanent Court of Arbitration in the *Atlantic Fisheries Case* favoured the thesis advanced by Politis, but the Borel arbitration in the *Affair of the Ottoman Debt* took the opposite view. The solution as given by judges of municipal courts cannot be considered acceptable inasmuch as in courts of first instance (in particular the Parity Tribunals) the problem is indubitably beyond the professional knowledge of the judge, and a decision in the High Court (Cour de Cassation) automatically deprives the government of its option to refrain from using its legal rights if it so desires. It is indeed true that the judge has the duty of interpreting treaties relating to private interests, but other matters besides private interests are in issue here and these are not the concern of the judge.

That the question is far more than one of interpretation is shown by the second of the three questions stated above. The matter is in part one of governmental decision and political opportunity. The question whether the treaty applies at all is not one the judge can determine, and it is moreover antecedent to any interpretation of the treaty that may be requisite. Only the executive can provide the answer; only the executive can decide within the limitations imposed by international law. If the government intends to exercise the right of denunciation it is natural, and indeed necessary, that it should declare the fact.

If the government declares its exercise of the right in a manner contrary to international law, has the domestic judge the right to remind the government of its obligations thereunder? Manifestly not; even could he do so in time of peace, it is clearly beyond his competence in time of war, for if the bounds of international law are overstepped, this is a question for an international jurisdiction to determine as between States. But this is precisely our difficulty: we are supposing the case in which the government has made no declaration at all. In that event the only reproach that can be made to the government is for not having exercised a right granted under international law. The domestic judge, however, has no right to make this reproach, which, coming from him, would be contrary to the principle of separation of powers between the executive and the judiciary.

One might be led to suggest that in determining an issue between private persons (Italian tenant-farmers (*métayers*) seeking extension of their lease, conversion to freehold or even pre-emption, and French landowners) the judge may rely upon rights derived from the general law, which rights the French landowner may validly set up, when the treaty has been abrogated, against the Italian farmer. But when war intervenes it can give rights only to the State, and not,

against the will of the State, to private persons. If the government does not denounce the treaty, no one can raise any valid objection, for in war the government must have its hands free, militarily, economically and psychologically.

Until, then, the government has expressly denounced the treaty, the judge is incapable of deciding the fate of private rights deriving therefrom. That is the only solution compatible with practical necessity. If the government intends the mere breaking off of diplomatic relations to produce this effect on treaties, it must declare as much (diplomatic relations between Great Britain and France and the U.S.A. and France were broken off during the Second World War without, however, producing this result). The judge can but follow the declaration of his government though this apparently is contrary to the law of nations. All these problems are outside the competence of the judge, as was in fact admitted when the Civil Chamber expressed concern as to what might be the opinion of the internationalists. And where, following the express order of the French Constitution of October, 1946, treaties take precedence over internal law, then, at least, when the Government has the option of annulling or retaining a treaty, let it declare its intention.

In this connection it is evident that any such declaration must be specific in its intention and results. When, for example, the *Journal Officiel* of October 14, 1945, declares: 'Conventions with Japan were annulled by the outbreak of war', it is clear that this declaration is valid for Japan only and can have no application in respect of Italy. Similarly, when on June 22, 1944, the Provisional Government of the Republic in Algiers declared the Franco-Italian Conventions of 1896 invalid, this denunciation applied to the Conventions of 1896 and to no others. In its decision of February 22, 1944, the Court of Tunis had stated: 'If the result of a state of war is to nullify the treaties and conventions existing between belligerent States, it is nevertheless clear in principle that stipulations in these treaties and conventions which do not concern the rights and duties of States but the interests of private persons, their status, nationality and rules relating to the acquisition of property and to the exercise of trade and commerce, etc., . . . *continue to exist unless the national law contains express provisions to the contrary*'. In a Press Conference on August 30, 1943, M. Massigli, the Commissioner for Foreign Affairs, declared: 'The dagger-thrust in the back of June 10, 1940, did not kill France but it killed the 1896 conventions; they will not revive'. M. Massigli re-affirmed this point of view before the Consultative Assembly in Algiers on November 23, 1943. The Court of Tunis, deciding as to the right of an Italian proprietor to reassume rights of ownership over

commercial property, refused to take these declarations into account in its judgment of February 22, 1944 (it was at the time ignorant of the Arrêt of November 5, 1943, owing to the severing of communications with metropolitan France on May 7 preceding). Though official in character, the Algiers declarations were not, as they should have been, in the form of an express formal declaration emanating from the Government. Only the French Committee of National Liberation could issue a declaration that the conventions of 1896 were no longer in force.

From the point of view of domestic law, it would seem that the Tunis Court was quite right in 1944 in refusing to consider the effect of the 1896 conventions at an end without a government order to that intent. Equally it would seem that the Supreme Court of France, unlike the French court in Tunis and the American courts in 1924 and 1925 and also in 1947 and 1948, failed to discern the essence of the matter, namely, the necessity of an express categorical declaration in due form by the government denouncing the private right in question, as an essential preliminary to a court decision to the same effect. The judge in France, influenced by the example of earlier decisions of the Cour de Cassation, proceeded to examine the question from the standpoint of international law which, except perhaps when it is free from doubt, and this is rarely the case, is as a matter of principle not his concern. Nevertheless from the standpoint of international law, we are of opinion that the decisions of the Social Chamber are completely in accord with the progressive spirit, which since the recent organisation of the United Nations, should also animate the judge of a municipal court. It is useless to suggest that the barbaric nature and the violence and scope of modern war make it impossible to reconcile with the status of enemy the increasingly generous rights in the field of private law that are nowadays accorded to aliens by treaties of commerce and establishment. The system advocated by the Institute of International Law might be ideal in the circumstances that inspired the idyllic aspirations of the Peace Conferences of The Hague. How is it possible in the conditions of modern warfare to preserve private rights of an economic order in favour of aliens that are incompatible with the personal and national loyalties by which those aliens are bound? Such reasoning, though striking, is clearly fallacious. The fact that modern war is increasingly terrible is no justification for abandoning the attempt to order the world on a legal basis of increasing respect for the rights of man. The noble words of Judge Cardozo in the case of *Techt* v. *Hughes*, that the judge must retain broad human sympathies, indicate a duty which the Social

Chamber of the Cour de Cassation did not fail to fulfil. No complaint can be made against it on that score.

Nor can the Social Chamber be criticised from the point of view of domestic law. During the whole of the early part of the war until June 10, 1940, Italy, the ally of Germany, remained non-belligerent and French policy could pride itself on keeping Italy outside the sphere of military operations. Vain expectation; Italy declared war. Then on June 24, 1940, an Armistice Convention was signed which it would be erroneous to consider as a mere temporary military truce. Article 21 of the Armistice Convention laid down that ' all Italian prisoners of war and interned civilians, imprisoned or condemned for political or military reasons or for any activity on behalf of the Italian Government shall be forthwith liberated '. On March 6, 1940, the French and Italian Governments regulated their commercial exchanges (Decree of March 20, 1940, *Nouvelle Revue de Droit International Privé*, 1941, p. 606). On November 20, 1940, the Italian Government decided to revive, during the continuance of the armistice convention, the Franco-Italian commercial agreements of April 14, 1938. Italians were to continue to be accorded their benefits under treaty. At the time the Social Chamber gave expression to French liberalism in the terms which we have seen, the Italians in question had been long established in France, having come there in reliance upon the policy of assimilation which the French Government was known to apply whenever their loyal attitude justified the Government's confidence. These Italians were so completely a part of the national economy that had they been discriminated against, French agricultural workers would have been the first to object, as, failing their expulsion from France, which was an impossibility, they would have become powerful rivals of French labour, for the reason that, enjoying lesser rights as against French landowners whose system of property-holding was menaced, these latter would prefer to employ such Italian labour rather than French. It is understandable that even if the French Government had the right to withdraw these advantages from the Italians, it was in its national interest to refrain from doing so. To be strictly correct this is the point upon which the Social Chamber should have insisted.

CONCLUSIONS

1. The effect of war must be considered not in relation to treaties but in relation to rights deriving from treaties.

2. Such rights as are embodied in the treaty out of humanitarian considerations (property, succession, access to the courts) or out of concern for the progressive development of law must in principle, and barring superior requirements of national defence, continue in

force after the outbreak of hostilities. (We use the word hostilities advisedly because acts of war, and not the declaration of war, are what matter.)

3. The opening of hostilities is in certain specified cases not a cause for the automatic abrogation but a justification for the denunciation of the treaty.

4. Whether such a case exists, in international law, should be decided on the basis of the objective incompatibility with the prosecution of the war of the treaty in question (not on the basis of its subjective or sentimental incompatibility).

5. If the government wishes any particular right exercisable within its territory by aliens who have become enemy to be nullified, it must declare the fact by express unilateral declaration, which is equivalent as regards the right envisaged to a denunciation of a treaty in the larger case.

6. The judge is competent to interpret the treaty, but has no jurisdiction to decide by his interpretation whether war puts, or has put, an end to any particular right deriving from the treaty. It is the government's function to pronounce on this point and its pronouncement will be binding on the judge.

7. The government may intentionally refrain from exercising the right of denunciation of treaties which it acquires on the outbreak of hostilities.

8. When the government acquires the right on the outbreak of hostilities to denounce a treaty in respect of any particular right, it may do so at any moment, and in any event at the peace, and its denunciation takes immediate, though non-retroactive, effect.

THE LEGAL STATUS OF THE UNITED NATIONS IN THE UNITED STATES

By Yuen-li Liang, S.J.D. *

The legal status of an international organisation in the territory of one of its Member States is a subject that has risen to a position of increasing importance by the decision taken by the Preparatory Commission of the United Nations in December, 1945, to establish its headquarters in the United States. The manifold problems implicit in this significant event, however, are not entirely new. Similar problems were faced and at least partly solved in connection with other international organisations, most particularly in the relation of the League of Nations to the Swiss Government,[1] and of the Permanent Court of International Justice to the Government of the Netherlands. Considerable pioneer work was done looking toward their solution in the inter-war period, but in the case of the precursor of the United Nations, *i.e.*, the League of Nations, these problems did not assume such a varied character and certainly did not reach such a large scale. Although the activities of the League of Nations were fairly extensive, they did not reach into the vast political, social and economic relationships of the Member States to the same extent as those of the United Nations. Also, as far as the number of international officials is concerned, the League Secretariat, at the peak of the activities of the League, had only about 800 officials and employees, as compared with the nearly 2,800 in the United Nations Secretariat today.

An adequate presentation of this subject, 'The Legal Status of the United Nations in the United States', would of necessity not only include the consideration of the status of the organisation itself, its juridical personality, its legal capacity, its privileges and immunities in federal, State and local law, but also include the

* Director, Division of the Development and Codification of International Law, United Nations Secretariat. During the first session of the General Assembly in London, January-February, 1946, Dr. Liang, as a Chinese delegate, was a member of the Sub-Committee of the Sixth (Legal) Committee which drafted the General Convention on the Privileges and Immunities of the United Nations. Any opinion expressed by the writer is his own and is not to be attributed to the organisation with which he is connected. This article is based upon a lecture given before the Forum on Current International Law, University of Michigan Law School, U.S.A., on July 15, 1948. The publication of this article is exclusive to the *International Law Quarterly*.—Editor's note.

[1] See Martin Hill, *Immunities and Privileges of International Officials, The Experience of the League of Nations* (1947).

consideration of the status of the representatives of the Members of the United Nations and of the officials and employees in its Secretariat. It is proposed first to enumerate the international and municipal instruments governing the status of the United Nations in the United States, then to discuss the main problems involved, and finally to offer a few observations of a general character on the significance of this question in current international law.

The juridical status of the United Nations is conceived in very general terms by the Charter adopted at San Francisco over three years ago. Article 104 provides that the organisation shall enjoy in the territory of each of its Members such legal capacity as may be necessary in the exercise of its functions and the fulfilment of its purposes. Exactly what was contemplated within the scope of the legal capacity envisaged in this Article was left for future determination. By way of example, the sub-committee which dealt with this subject at San Francisco stated ' that the organisation must be able, in its own name, to contract, to hold movable and immovable property, to appear in court '. Drafters of Article 104 preferred to express no opinion on the procedures of municipal law which would be necessary to assure legal capacity to the organisation in the Member States. The sub-committee suggested that in a majority of Member States it might be found indispensable for the organisation to be recognised as a juridical personality. The Charter, however, does not stipulate express recognition of the international legal personality of the organisation. This was left to be ' determined implicitly from the provisions of the Charter as a whole '.[2]

It was suggested by the United States Delegation in its report to the President on the results of the San Francisco Conference, that the failure to grant express recognition of the legal personality of the United Nations was due to a desire to avoid any implication that the United Nations is, in any sense, a ' super-State '.[3]

Article 105 provides that the organisation shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes and that the representatives of the Members of the United Nations and the officials of the organisation shall enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connection with the organisation. The General Assembly is authorised to make recommendations with a view to determining the details of the privileges and immunities within the purview of this Article

[2] Report of Sub-Committee IV/2/A on the Juridical Status of the Organisation, Doc. 803, IV/2/A 7, June 6, 1945, UNCIO Docs., Vol. 13, p. 817.

[3] Report to the President on the results of the San Francisco Conference Department of State Publication 2349, Conference Series 71, p. 157, June 26 1945.

and may propose conventions for this purpose to the Members of the United Nations.

It has been recognised for some time that international organisations and their officials representing the interest of the community of States as a whole are no less in need of privileges and immunities than are foreign governments and their representatives. In the recent past, international organisations in the United States often asked that they should be given governmental status and that the position of their officials should be assimilated to that of officials of foreign governments. But in spite of strong arguments based upon logic and analogy, and in spite of precedents which had grown up, the United States Government held the view that no privileges or immunities of international organisations existed under customary international law or could be extended to them without legislative authorisation. Only recently, in the case of *Chapman* v. *Commissioner of Internal Revenue*, the Federal Tax Court rejected the plea of a League of Nations official, who had worked at Princeton University during the war years, that as an employee of a group of foreign governments he was entitled to immunity from United States income tax.[4]

Under American law, therefore, it is necessary that such status and privileges should be defined by treaty or statute in order to come within the protection of the law. There are five major instruments which must be considered in this respect in determining the status of the United Nations in American law. First of all, there are Articles 104 and 105 of the Charter of the United Nations which, as has already been observed, are worded in very general language. However, by virtue of the fact that the Charter of the United Nations has been ratified by the United States as a treaty, these two Articles are part of the law of the land and have been held to be self-executing at least in one decision of the courts.

The second instrument of importance is, in point of time, the International Organisations Immunities Act which became operative on December 29, 1945.[5] This Act constitutes a recognition by the United States Government of the need for granting to international organisations a legal status adequate to insure the effective performance of their functions and fulfilment of their purposes.

This Act confers status and grants privileges and immunities, not only to the United Nations, but to other international organisations

[4] *Chapman* v. *Commissioner of Internal Revenue*, 9 T.C. No. 87 (October 9, 1947).

[5] 59 Stat. 669 (1945), 22 U.S.C.A. s. 288. See Lawrence Preuss, 'The International Immunities Act', in *American Journal of International Law*, Vol. 40, pp. 332–345 (1946).

in which the United States participates, and which have been designated by the President to be eligible for the benefits of the Act. After the Act came into force, the President immediately designated the United Nations, the Pan-American Union, UNRRA, the International Labour Organisation, and the Food and Agriculture Organisation as eligible.[6] By successive designations, this Act has been extended to other international organisations.

The third instrument is the General Convention on Privileges and Immunities of the United Nations, which may be more briefly referred to as the General Convention. Under paragraph 3 of Article 105 of the Charter, the General Assembly may make recommendations or propose conventions to the Members of the United Nations for the purpose of determining the details regarding the privileges and immunities necessary for the fulfilment of the functions of the United Nations. One of the first decisions of the General Assembly at the first part of its first session in London was the preparation of such a convention, later entitled the General Convention on Privileges and Immunities of the United Nations. It was adopted by the General Assembly on February 13, 1946, and communicated to the Member States for their acceptance.[7] Up to date, twenty-eight States,[8] including the United Kingdom and France, have deposited with the United Nations their instruments of accession to the Convention. The United States has not as yet acceded to it. In June, 1947, during the Eightieth Session of the Congress the Convention was included in an omnibus Bill (the United Nations Participation Act) unanimously recommended by the Committee on Foreign Affairs to the House of Representatives for its approval, together with the proposal for the approval of the United Nations Headquarters Loan and the proposal for the strengthening of the United Nations.[9] No part of the omnibus Bill

[6] Executive Order 9698, Fed. Reg., Vol. 11, No. 36, p. 1809 (February 20, 1946).

[7] Resolutions adopted by the General Assembly during the First Part of its First Session, p. 25. See *Official Records* of the First Part of the First Session of the General Assembly, Plenary Meetings of the General Assembly, Verbatim Record, January 10—February 14, 1946, p. 455. For comment, see Clive Parry, 'International Government and Diplomatic Privilege', in *Modern Law Review*, April, 1947, pp. 97–121.

[8] As of November 1, 1948. In the order of the deposit of the instruments of accession, these Member States are listed as follows: United Kingdom, Dominican Republic, Liberia, Iran, Honduras, Panama, Guatemala, El Salvador, Ethiopia, Haiti, France, Norway, Sweden, Afghanistan, Philippines, Nicaragua, New Zealand (with a reservation to s. 18 (*b*) regarding the exemption of nationals from income tax), Greece, Poland, Canada (with a reservation to s. 18 (*b*) regarding the exemption of nationals from income tax), Iceland, Netherlands, India, Denmark, Egypt, Pakistan. Belgium, Chile. See the latest report of the Secretary-General of the United Nations on Privileges and Immunities of the United Nations, September 7, 1948: U.N. Doc. A/626.

[9] See United Nations Participation Act, Report of the Committee on Foreign Affairs on H.R. 6802, June 9, 1948.

was considered by the House because of the impending adjournment. When a special session of the Congress was called by the President for August, 1948, only that part of the United Nations Participation Act dealing with the United Nations Headquarters Loan was passed, and no action was taken on the General Convention. The Committee on Foreign Affairs was, however, assured that the other provisions of the Bill, including the General Convention, would be brought before the House for debate at the next session of the Congress, which convened in January, 1949.

Thus the General Convention has not received the legislative imprimatur required for the United States to deposit its accession with the United Nations. The General Convention has therefore not yet acquired the force of law in the United States, but as the Headquarters Agreement, subsequently referred to, was drawn up in anticipation of the eventual accession by the United States to the General Convention, and as the Agreement is admittedly inadequate except in the context of the General Convention, the provisions of the General Convention must be considered in the discussion of the entire problem.

There appears to be no general opposition in the United States to its acceding to the General Convention, though discussions which have taken place in the General Assembly indicate that the United States Government will probably make reservations in regard to immunities from income tax and from national service in so far as American citizens, members of the U.N. Secretariat, are concerned, and in regard to the provisions concerning the United Nations *laissez-passer*.[10] These will be discussed later in this article.

The fourth instrument which should be mentioned is the agreement between the United Nations and the United States of America regarding the Headquarters of the United Nations, hereinafter referred to as the Headquarters Agreement. While the General Convention is a multilateral instrument defining privileges and immunities of the United Nations and its officials in the territory of *all* Member States, the Headquarters Agreement is a bi-lateral instrument defining the particular arrangements which have been agreed to between the United Nations and the United States, arrangements that are considered necessary in view of the fact that the Headquarters has been located in that country.

Negotiations concerning what was first called a 'Site Convention' were begun by the Secretary-General of the United Nations

[10] U.N. Doc. A/427, p. 6 (October 27, 1947).

on the one hand, and the United States on the other, in the summer of 1946, and a draft was agreed upon.[11] However, when the General Assembly decided in November, 1946, on a metropolitan site in mid-town Manhattan as the permanent Headquarters in place of the rural area in the vicinity of New York as originally envisaged, it was recognised that several changes would be necessary. Negotiations were re-opened and an Agreement was concluded on June 26, 1947.[12] Its acceptance was authorised by a Joint Resolution of Congress on July 26, 1947.[13] The Agreement was approved by the General Assembly on October 31, 1947,[14] and brought into effect by an exchange of notes on November 21, 1947. The provisions of the Headquarters Agreement are intended to be complementary to the provisions of the General Convention, and, wherever possible, the provisions of the Convention and Agreement are to be interpreted in such a manner as to give effect to both. However, it is specifically provided that, should there be conflict between the two, the Headquarters Agreement will prevail over the Convention.[15]

The fifth and last instrument which it is necessary to note is the Interim Headquarters Agreement which was brought into effect on December 18, 1947, and which extends the relevant provisions of the Headquarters Agreement to the temporary site of the United Nations at Lake Success. This Interim Agreement, although of only temporary significance, has already been invoked on several occasions. One of the incidents involved two newspaper correspondents accredited to the United Nations who, soon after the Agreement went into effect, were arrested and detained for deportation as alien Communists by the United States immigration authorities.[16]

Officials of the United Nations intervened on their behalf invoking relevant provisions in the Interim Headquarters Agreement. Doubt, however, was expressed by the State Department as to whether the agreement was applicable to these correspondents because they had been re-accredited without the consultation with the United States required in the agreement.

It was subsequently agreed that the two men should be released, but the United States suggested that to avoid further misunderstandings the entire list of representatives of the press, radio, film and other information agencies accredited to the United Nations in

[11] U.N. Doc. A/67 (September 1, 1946).
[12] U.N. Doc. A/371 (September 3, 1947).
[13] Public Law, No. 357. Signed by the President on August 4, 1947.
[14] General Assembly Resolution 169 (II). U.N. Doc. A/P.V. 101, pp. 82–90 (October 31, 1947).
[15] Section 26 of Headquarters Agreement.
[16] See U.N. Press Release M/361 (December 22, 1947), and M/362 (December 23, 1947), and Note from the United States Mission to the United Nations, 18 *Department of State Bulletin*, p. 48 (January 11, 1948).

its discretion should be reviewed by the United Nations, in consultation with the United States, so as to bring all bona fide representatives clearly under the protection of the Agreement. Discussions have since been conducted, and an understanding has been reached.

JURIDICAL PERSONALITY

Although the Charter of the United Nations does not expressly provide 'juridical personality' for the organisation, this omission is supplied by Article 1 of the General Convention. Section 1 specifically states 'the United Nations shall possess juridical personality' and also specifically provides that the organisation shall have the capacity to contract, to acquire and dispose of movable and immovable property, and to institute legal proceedings.

The concept of corporate personality has been the subject of extensive literature and has received vigorous, and in many ways, convincing criticism.[17] The controversy between the proponents of the fiction theory and the reality theory of corporate personality has created considerable doctrinal divergence in municipal law, and has led many writers to send up a cry of 'conceptualism'. It might be hoped that these barren debates in the realm of theory could be kept out of the sphere of international law, and that international legal entities should be recognised as having certain specific rights and capacities without being encumbered with the analogy to a natural person. Mr. C. W. Jenks, Legal Adviser of the International Labour Office, has persuasively argued, however, that despite the obvious disadvantage of introducing this controversy into international legal literature, the practical advantages of expressly recognising legal personality are compelling.[18] He states:

> 'International practice must always be expected to lag somewhat behind doctrinal analysis and, despite the wealth of controversy which it has provoked, the concept of legal personality is so much more widely understood in the majority of countries than any newer terminology that for practical purposes it would seem more convenient to continue using it to define the status of public international organisations as legal entities.'

It is significant that governments have found it convenient to take

[17] John Dewey, 'The Historic Background of Corporate Legal Personality', in *Yale Law Journal*, Vol. 35, pp. 655–673 (1926). See C. W. Jenks, 'The Legal Personality of International Organisations' in *British Year Book of International Law*, Vol. 22, 1945, and bibliography cited in footnote 1 on p. 267.

[18] C. W. Jenks, *loc. cit.*, p. 267, at 271.

appropriate action in a form tantamount to the recognition of the legal personality of the international organisation.

It would seem that the concept of legal personality of international organisations should be written into international instruments, not because of its theoretical or doctrinal soundness, but because it has substance in the context of municipal law. A few words may thus be used to supply a wealth of meaning which otherwise would be very difficult to convey.

IMMUNITIES OF THE ORGANISATION

A second question to be considered is the immunities which the organisation itself is to enjoy. One of the first and most fundamental requirements is the immunity from suit in the courts of its Member States. Jurisdictional immunity is deemed essential for an international organisation which represents the general interest of the community of States. The possible danger of prejudice or bad faith in the national courts is a minor and comparatively unimportant reason. More significant is the need of protection against baseless actions which might be brought against the organisation by cranks, fanatics, and persons of similar ilk. Another reason is the undesirability of depending on the courts of individual Member States for the determination of the legal effects of acts performed in the exercise of the functions of the organisation. To allow national courts to make such determination would also offer the possibility of varied effects being given in different countries to the acts of the organisation, and would interfere seriously with the necessary independence of the organisation from the exercise of influence by Member States.[19]

An interesting case in a lower New York court was that brought late in 1947 by Father Curran, in his capacity as a taxpayer, against Trygve Lie, as Secretary-General of the United Nations, and against the City of New York.[20] Father Curran asked for judgment declaring invalid certain grants, allocation of funds, and tax exemptions in connection with the Headquarters site. Under the direction of the Attorney-General of the United States, a petition was submitted bringing to the attention of the court a suggestion of the Department of State that 'rights of immunity' be granted to the United Nations. In an Annexed Letter it was stated that the Department of State allows, recognises, and certifies the

[19] See Hugh McKinnon Wood, 'Legal Relations between Individuals and a World Organisation of States', in *Transactions of the Grotius Society for the Year 1944*, Vol. 30, p. 141, at 143–144.

[20] *Curran* v. *City of New York*, 119 N.Y.L.J. 16 (January 2, 1948).

immunities of the United Nations and of Mr. Trygve Lie as its Secretary-General. The court, following a long line of precedents, in January, 1948, declared itself bound to accord recognition to and uphold the suggestion of immunities presented by the Department of State.

Immunity of the United Nations from suit in the courts of Member States raises the question as to who is to determine claims between the organisation and persons with whom it must do business. How is the essential immunity of the organisation to be reconciled with the rights of persons who come in contact with it and have a legal remedy for wrongs? While the organisation might waive its immunity, and it is even envisaged that this might be done in advance in the conclusion of certain contracts, there is serious objection to the waiver of the immunity of the organisation itself, as distinguished from the waiver of the immunity of its officials.

There appears to be a need for some kind of international tribunal which can determine rights between the organisation and persons having claims against it. Section 29 of the General Convention provides that the United Nations shall make provisions for appropriate modes of settlement of disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party.

The opinion in the *Curran Case* in dismissing the suit against the City of New York as well as against the Secretary-General is also of interest because it confirms the immunity of the United Nations from local taxation. Of particular significance is the statement of Mr. Justice Hill that Articles 104 and 105 of the Charter are self-executing. He held : ' Even without further action by Congress or by the State, the effect of Article 104 would be to give to the United Nations the legal status and capacity to own land in the United States. Also, without further action by Congress or the State, the immunities " necessary to the fulfilment of its purposes ", conferred upon the United Nations by Article 105, includes immunity from taxation '.[21]

REPRESENTATIVES OF MEMBERS OF THE UNITED NATIONS

A third issue involves the immunity of the representatives of governments. As has been seen, the privileges and immunities of representatives of the Members of the United Nations which are necessary to the independent exercise of their functions are provided in very general terms in the Charter. These immunities are more

[21] See note 20.

particularly defined in Article 4 of the General Convention. Article 7 of the Covenant of the League of Nations provided that the representative of Members when engaged in the business of the League should enjoy diplomatic privileges and immunities. The Charter of the United Nations, however, avoided any reference to diplomatic status. The International Organisations Immunities Act expressly states ' that no person shall, by reason of the provisions of this title, be considered as receiving diplomatic status '.[22]

Article 5, Section 15, of the Headquarters Agreement, however, provides for a limited class of resident representatives of Member States of the United Nations to receive in the United States the same privileges and immunities as are accorded to diplomatic envoys accredited to the United States. The report of the Senate Committee on Foreign Relations, presented by Senator Vandenberg states : ' thus a limited group of the more important representatives to the United Nations will receive the same diplomatic status as their colleagues in Washington, who are accredited to the United States Government '.[23]

A further question arises whether the privileges granted by the United States to the representatives of Member States may be conditioned upon reciprocity. The present Legal Adviser of the Department of State, in a letter to the Committee on Foreign Affairs of the House of Representatives, said that the Charter of the United Nations imposes the obligation on Member States to grant certain privileges and immunities not conditioned on reciprocity.[24] The Immunities Act, however, contained a provision authorising the Secretary of State to withdraw the benefits of the Act from the nationals of any foreign country which failed to accord corresponding privileges to citizens of the United States.[25] As thus interpreted, this provision is merely an authorisation to the Secretary of State to insist on reciprocity if he deems it advisable, but the provision does not require such insistence.[26] The immunities granted in the General Convention and in the Headquarters Agreement do not permit ' the setting up or the invoking of any condition of reciprocity '.[27]

According to Section 13 of the Headquarters Agreement, persons entitled to diplomatic immunity may not be required to leave the

[22] International Organisations Immunities Act, s. 8 (*c*).
[23] Report No. 559, Senate Committee on Foreign Relations, p. 4 (July 15, 1947).
[24] Report of the Committee on Foreign Affairs on H.R. 6802, p. 16 (June 9, 1948).
[25] International Organisations Immunities Act, s. 9.
[26] See letter from Legal Adviser of State Department to Chairman of Sub-Committee No. 6 of the Committee on Foreign Affairs. Report on H.R. 6802, p. 16 (June 9, 1948).
[27] *Ibid.*

United States otherwise than in accordance with the customary procedure applicable to diplomatic envoys accredited to the United States. In this regard, the question has come up whether the principle of persona non grata applies. This principle apparently was made applicable by the Immunities Act, under which the Secretary of State had the power to require the departure of any person whose continued presence in the United States was considered undesirable.[28]

The Secretary-General of the United Nations, in a report to the General Assembly, stated that the procedure for requiring persons entitled to diplomatic immunity to leave the United States 'could not be applied in the case of a persona non grata'.[29] He explained that there must have been some independent act outside the person's official capacity coming within the scope of specific laws or regulations. The Legal Adviser of the Department of State, however, seems to take the opposite view. He states that the Headquarters Agreement may empower this Government to require the recall of certain foreign nationals covered by the Convention, if they are regarded as personae non gratae.[30]

It would seem that the position of the Secretary-General represents a sounder view on this issue. The principle of persona non grata is related to the right of a government, to which the representative is accredited, to ask for his recall for any number of reasons, political or otherwise, which may make him unsatisfactory to the government to which he is accredited. In the case of a representative of a Member of the United Nations, the accreditation is to the United Nations and not to the United States, and it would seem that there should be some act outside the scope of his official functions before the United States could consider itself justified in asking for his recall. As explained by the Secretary-General, the procedure referred to in Section 13 'can only apply within very narrow limits, since the United States is the host country and not the country to which beneficiaries of Article 4 (of the Agreement) are accredited'.[31]

OFFICIALS OF THE ORGANISATION

There are many problems of particular interest concerning the privileges and immunities of officials of the organisation. Whether

[28] International Organisations Immunities Act, s. 8 (*b*). See Preuss, *loc. cit.*, *supra*, note 5, at p. 337.
[29] U.N. Doc. A/371, p. 6 (September 3, 1947).
[30] Report of the Committee on Foreign Affairs on H.R. 6802, p. 16 (June 9, 1948). See Press Release No. 438, United States Mission to the United Nations, p. 6 (April 23, 1948).
[31] U.N. Doc. A/371, p. 6 (September 3, 1947).

the officials of an international organisation should be accorded 'diplomatic immunities', or less extensive immunities and privileges based on the nature of their functions has been the subject of considerable discussion. Unlike the Covenant of the League of Nations, the Charter, as we have noted, does not specifically mention diplomatic immunity. The General Convention has achieved a compromise in this respect. All officials of the United Nations in categories specified by the Secretary-General are entitled to certain enumerated immunities.[32] In addition to these privileges and immunities specifically enumerated, the Secretary-General and all Assistant Secretaries-General are accorded, in respect to themselves, their wives, and minor children, 'the privileges and immunities, exemptions and facilities accorded to diplomatic envoys in accordance with international law'.[33]

It has been frequently asserted that the difference between national diplomatic agents and international functionaries furnished a reason for a corresponding differentiation in their treatment. Professor Preuss has pointed out, however, that the grounds upon which a modification of the position of international functionaries could be justified would be equally applicable as arguments for the reduction of diplomatic immunities in general.

> 'Diplomatic prerogatives' [he argues] 'have been accorded to the agents of international organisations in order to protect the interests with which they are charged from interference by the State of residence. If they are granted in more liberal measure than is necessitated by the independence which they are designed to safeguard, it is equally true that they exist in an exaggerated extent in the case of ordinary diplomatic agents. In both cases the theoretical basis of the special position now granted is the interest of function, and it is only the influence of traditional preconceptions that prevents the general recognition of the principle that the international interest has as great a claim to protection as that of national States'.[34]

ACTS PERFORMED IN OFFICIAL CAPACITY

The immunity from suit granted to most officials of the United Nations is immunity only in respect of acts performed by them in their official capacity. In 1934, the Second Commission of the Institute of International Law in a report presented to the Institute

[32] General Convention, s. 18.
[33] General Convention, s. 19.
[34] Lawrence Preuss, 'Diplomatic Privileges and Immunities of Agents Invested with Functions of an International Interest', in *American Journal of International Law*, Vol. 25, p. 694, at 710 (1931).

suggested that there should also be exemption of private acts, because, if an official is subject to the jurisdiction of national courts in relation to *any* acts, he will be hampered in the free discharge of his functions.[35] This position, however, was not adopted by the General Convention.

In Article 7 of the Covenant of the League of Nations, officials of the League were granted diplomatic privileges and immunities ' when engaged on the business of the League '. This last phrase might be restrictively interpreted so as to confine the immunity to acts performed in an official capacity. However, the *Modus Vivendi* concluded by the League with the Swiss Government in 1926, in differentiating diplomatic immunities from immunities for official acts, was based on the conception that exceptions for private acts are reckoned among the immunities which may be termed diplomatic in the narrow sense.[36] The phrase ' when engaged on the business of the League ' might be interpreted also to refer not to a limitation as to the nature of the acts performed, but to a limitation as to the time in which the immunity would apply. The phrase ' acts performed in their official capacity ', which appears in the General Convention, is, however, not open to this interpretation as it clearly excludes private acts. Only the Secretary-General and the Assistant Secretaries-General, by virtue of their diplomatic immunity, granted under the General Convention, will be immune from jurisdiction in relation to their private acts.

The fact that immunities are extended only to official and not to private acts raises the interesting question as to who is to determine whether a particular act is official or private. Should this important decision be left to the national courts? Strong arguments can be adduced against allowing national courts to make this determination. It has been argued, for instance, that ' if a national court can assume jurisdiction over the private acts of an international official without waiver of immunity by the international institution concerned, the determination of the official or private character of a particular act passes from international to national control, and that in the case of international as in that of diplomatic immunities, the only principle which affords protection is that of complete immunity from jurisdiction '.[37]

[35] Institut de Droit International, Session de Madrid (1934), Douzième Commission, Rapport présenté par M. Ake Hammarskjöld, ' Immunités à reconnaître aux personnes investies de fonctions d'intérêt international ', p. 27.

[36] Preuss, *loc. cit.*, *supra*, note 34, at pp. 706–707.

[37] C. W. Jenks, ' Some Problems of an International Civil Service ', in *Public Administrative Review*, Vol. 3, p. 103 (1943). See Preuss, ' Immunity of Officers and Employees of the United Nations for Official Acts: The Ranollo Case ', in *American Journal of International Law*, Vol. 41, p. 555, at 572–573 (1947).

In a particular instance, should the United Nations see fit to question the correctness of a determination by a court of the United States, this would constitute a difference arising out of the interpretation or application of the provisions of the Headquarters Agreement or of the General Convention, as the case may be. Detailed procedures are laid down in each case for the settlement of the difference and its eventual submission to international arbitration.[38] Thus, while the decision as to the official or private character of an act is made in the first instance by the national court, such a decision is by no means final and is subject to review on the international plane, if it is questioned by the United Nations.

An effort to confine even further the immunities of the 'officers and employees' of the United Nations by adopting a restrictive interpretation of the phrase 'acts performed in their official capacity', as used in the Immunities Act, is illustrated by the *Ranollo Case* decided by the City Court of New Rochelle on November 8, 1946.[39] The defendant, Ranollo, chauffeur of the Secretary-General of the United Nations, was charged with exceeding the speed limit while operating a car owned by the United Nations, in which the Secretary-General himself was then riding. Mr. Oscar Schachter, Legal Counsellor of the United Nations and counsel for the defendant, in a memorandum to the court, contended that:

> 'There was no doubt that the defendant was acting in his official capacity when he was driving the Secretary-General on the Hutchinson River Parkway on October 17. Mr. Lie was at that time on his way to a conference with officials of the City of New York concerning business of the United Nations. The act of driving the Secretary-General was, of course, performed by the chauffeur in his "official capacity" and fell within his functions. Accordingly, it is clearly covered by Section 7 (*b*) of the Immunities Act'.[40]

The court ruled that upon the facts in the case the defendant was not entitled to immunity as a matter of law without a trial of the issue of fact and was accordingly required to plead to the information before the court.

In the opinion of the court, it was pointed out that the interest of the United Nations could be reconciled with the general interest only if the application of the principle of immunity was interpreted as being limited to those personnel whose activities are such as to be

[38] Section 21 of Headquarters Agreement, and s. 30 of General Convention.
[39] *County of Westchester* v. *Ranollo*, 67 N.Y.S. (2d) 31 (1946).
[40] Unpublished Memorandum for the Court. See also Preuss, *loc. cit.*, *supra*, note 37, at p. 565.

necessary to the actual execution of the purposes and deliberations of the United Nations as distinguished from those household servants and personnel who merely serve the personal comfort, convenience or luxury of the delegates and Secretariat who actually perform the true functions of the organisation.

The court also indicated that it would be inclined to follow a certification of the State Department that the exemption from prosecution or suit was in the public interest. Mr. Fahy, then Legal Adviser of the Department of State, in a letter to the Secretary-General, stated that, in his opinion, the employee in question was entitled to the immunity claimed, but added that this was his own opinion and nothing more.

Notwithstanding this reply from the Legal Adviser of the State Department, the Secretary-General of the United Nations indicated to the court that he had no desire to press the principle of immunity in the instant case, and informed the court that he was prepared on behalf of the defendant to pay such fine as might be levied.

WAIVER OF IMMUNITY

This action brings us to the consideration of another subject which may be viewed more as a question of policy than as one of legal rights and duties, namely, the waiver of immunity.

The existence of privileges and immunities entails a serious responsibility to prevent their abuse. The shelter of immunity should not be permitted to countenance wilful or reckless violation of the law. In the *Ranollo Case*, the court maintained that the existence of a general and unrestricted immunity for all official acts, would involve a concession to the officials of the United Nations of a more privileged position than that granted to foreign diplomatic agents and their staffs. He suggested that the latter were at least theoretically subject to recall and trial in the courts of their own States. It is to be pointed out, however, that adequate safeguards against the abuse of privilege may be found in the settled policy of the United Nations to waive immunity whenever this can be done without interference with the work of the organisation. The threat of waiver serves as an effective brake upon any official or employee who might otherwise be inclined to abuse his privileges. Under the General Convention, the Secretary-General has both the right and the duty to waive the immunity of any official in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interests of the United

Nations. The Security Council is authorised to waive the immunity of the Secretary-General himself.[41]

It may be noted that the policy of waiver of immunity was usually followed by the League of Nations in regard to civil suits against its officials. The policy of the United Nations, on the other hand, has been in favour of a more generous use of the waiver. It was stated by a former Legal Adviser of the League Secretariat that in the practice of the League where an offence against the law, such as a violation of traffic regulations was charged, immunity was not waived.[42] In the practice of the United Nations, however, the policy of waiver in such cases has been consistently followed, as is illustrated by the *Ranollo Case* and several other less well-known cases. It is obvious that the waiver of immunity for an official is not open to the same objection as the waiver of immunity of the organisation itself. In the latter case, a more strict policy of waiver is necessary in the interest of the organisation and it is expressly laid down in the General Convention that no waiver of immunity shall extend to any measure of execution.[43] These considerations would not apply with equal force in the case of the immunities of officials. As provided in the General Convention, privileges and immunities are granted to officials not for the personal benefit of the individuals themselves but in the interests of the United Nations as a whole.

PROBLEMS OF NATIONALITY DISCRIMINATION

One of the thorny problems involved in the subject of the immunity of international officials is that of nationality discrimination. While States are willing to grant immunities to international officials of foreign nationality, they have shown great reluctance to grant immunity to their own nationals. This issue was warmly debated both in the Assembly of the League of Nations and in unofficial conferences of international jurists.

The Report of the Second Commission of the Institute of International Law presented to the Session of Madrid (1934) demonstrated a strong tendency to approve the view that exemption from jurisdiction over acts of officials should be extended to nationals and non-nationals alike.[44] The *Modus Vivendi* of 1926, concluded by the League of Nations with the Swiss Government, conceded that

[41] General Convention, s. 20.
[42] Hugh McKinnon Wood, *loc. cit.*, *supra*, note 19, at p. 163.
[43] General Convention, s. 2.
[44] Institut de Droit International, Session de Madrid (1934), Douzième Commission, Rapport présenté par M. Ake Hammarskjöld, 'Immunités à reconnaître aux personnes investies de fonctions d'intérêt international', p. 27.

officials of Swiss nationality should not be sued before the local courts in respect of acts performed by them in their official capacity and within the limits of their official duties. It also granted exemption from cantonal and municipal direct taxes. But no mention was made of diplomatic immunities proper in favour of Swiss nationals.[45]

The Immunities Act of 1945 is based squarely on the principle of nationality discrimination.[46] Its benefits are extended to aliens only, except in the case of immunity for official acts, to which United States nationals are also entitled. The General Convention adopts the principle of equal treatment, but spokesmen of the United States Government have indicated the likelihood that reservations may be made concerning immunities from income taxes and national service obligations of United States nationals.

In regard to income taxes, the United States has expressed, as a matter of principle, the reluctance to create a privileged class of tax-free citizens.[47] While this is an understandable preoccupation, it would seem that it does not take into account the fact that the exemption is not accorded as a concession to the individual official or employee, but in the interest of the organisation and ultimately of its Member States. Such tax exemption releases the Member States from the increased burden upon their budgets which would be entailed by the payment of salaries at a necessarily higher level if income taxes were levied.[48]

The Secretary of State, in a letter dated May 7, 1948, to the Chairman of the Committee on Foreign Affairs of the House, pointed out that only nationals of the United States and Canada were at present subject to taxes on their income from the United Nations. In order to afford equality of treatment to all members of the Secretariat staff, the General Assembly had in the past authorised the Secretary-General to reimburse employees for taxes which they paid to their national governments on income received from the United Nations. The cost of such tax reimbursement was approximately $500,000 annually, of which about $450,000 represented payments to United States nationals. The General Assembly, however, had given a warning that the tax reimbursement plan might not be continued beyond 1948. If the reimbursement plan were abandoned, United States nationals employed by the Secretariat

[45] Jacques Secrétan, 'The Independence Granted to Agents of the International Community in their Relations with National Public Authorities', in *British Year Book of International Law*, Vol. 16, 1935, p. 68.
[46] Preuss, *loc. cit.*, *supra*, note 5, at p. 337.
[47] See Report of the Committee on Foreign Relations on S. J. Res. 136 and 144 (July 15, 1947).
[48] See Preuss, *loc. cit.*, *supra*, note 5, at p. 340.

would be earning a net salary substantially lower than their colleagues from other countries. As a result, the Secretary of State pointed out, it would be difficult for the United Nations to recruit well-qualified American citizens.[49]

In view of the probability that a staff contributions plan, under which United Nations employees would make contributions from their salaries to the United Nations, would be adopted by the General Assembly, thus avoiding the existence of a tax-free group, the Committee on Foreign Affairs of the House has recommended the accession to the General Convention without a reservation as to tax immunity. But it has adhered to the position that the control of national service obligations of American citizens should be retained by the United States.[50] During the Second Session of the General Assembly, Sub-Committee 1 of the Sixth Committee expressed the view that, if the complete exemption of all officials of United States nationality from such obligations could not be accepted, it was most desirable that there should be no possibility of the work of the United Nations being hampered by the calling up of such officials. It commended this point for further discussion between the Secretary-General and the proper authorities of the United States.[51]

UNITED NATIONS LAISSEZ-PASSER

Section 24 of the General Convention authorises the United Nations to issue to its officials *laissez-passer* which ' shall be recognised and accepted as valid travel documents by the authorities of Members '. It was originally suggested in the Report of the Preparatory Commission of the United Nations to the First Part of the First Session of the General Assembly held in London in 1946 that ' in order to facilitate the travelling of officials it may be found desirable to institute an international passport issued by the Organisation, describing the holder as its official '.[52] The word ' passport ' which appeared in the draft convention proposed by the Preparatory Commission was changed to ' *laissez-passer* ' in the General Convention as adopted by the General Assembly.

While it is clear that the *laissez-passer* was not intended to dispense with the right of a Member State to require visas, Section 25

[49] United Nations Participation Act, Report of the Committee on Foreign Affairs on H.R. 6802, pp. 17–18 (June 9, 1948).
[50] *Ibid.*, at pp. 18 and 19.
[51] U.N. Doc. A/427, p. 7 (October 27, 1947).
[52] Report of the Preparatory Commission of the United Nations (Study on Privileges and Immunities appended to Chap. VII of Report), p. 62 (1946). See Josef W. Kunz, ' Privileges and Immunities of International Organisations ', in *American Journal of International Law*, Vol. 41, p. 828, at 856; Martin Hill, *op. cit.*, *supra*, note 1, at pp. 110–111 and 266.

provides that 'Applications for visas (where required) from the holders of United Nations *laissez-passer*, when accompanied by a certificate that they are travelling on the business of the United Nations, shall be dealt with as speedily as possible'. There is, however, some disagreement as to the exact nature of the *laissez-passer* and, particularly, in regard to whether it is a substitute for a passport. The Convention provides that it shall be recognised and accepted as a 'valid travel document'. On the other hand, representatives of the United States have shown a tendency to interpret this provision restrictively. Thus the Secretary of State in a letter to the Speaker of the House of Representatives on May 12, 1947, wrote:

> 'This language does not authorise or require, and is not interpreted by the Department of State as authorising or requiring the United Nations or any Member State to issue or accept a document which is a substitute for a passport or other documentation of nationality; it provides only for a certificate attesting to the United Nations affiliation of the bearer in respect to travel and will be accepted by the United States as such a document'.[53]

During the Second Session of the General Assembly, Sub-Committee 1 of the Sixth Committee noted that 'the United States Government was disposed to put upon the provisions of Article 7, relating to the United Nations *laissez-passer*, an interpretation which would greatly diminish the value of the *laissez-passer*'. The Sub-Committee expressed the hope that further discussion on this point between the Secretary-General and the appropriate authorities of the United States might lead to a modification of the views of the United States Government, with the result that the provisions of Article 7 relating to the *laissez-passer* should produce the full effects which they were designed to secure.[54]

AUTHORITY WITHIN THE HEADQUARTERS DISTRICT

Another interesting point raised by the Headquarters Agreement concerns the authority of the United States over the area set aside as the United Nations capital. Section 7 of the Agreement provides that the headquarters district shall be under the control and authority of the United Nations, but that, except as otherwise provided in the Agreement or in the General Convention, the

[53] Report of the Committee on Foreign Affairs on H.R. 6802 (1948), pp. 19–20.
[54] U.N. Doc. A/427, pp. 6–7 (October 27, 1947). However, the proposals before the Congress would have incorporated this restrictive interpretation into the act of accession by the United States. See s. 8 (*b*) of the United Nations Participation Act (H.R. 6902).

Federal, State and local law of the United States will apply within the district.

However, under Section 8, the United Nations has the power to make regulations operative within the headquarters district for the purpose of establishing therein conditions in all respects necessary for the full execution of its functions. No Federal, State or local law inconsistent with the regulations of the United Nations authorised under the Agreement will, to the extent of such inconsistency, be applicable within the district. Any dispute which may arise between the United Nations and the United States as to whether a regulation of the United Nations is authorised by the Agreement, or whether a Federal, State or local law is inconsistent with any regulation of the United Nations, if not settled by negotiation or other agreed mode of settlement, is to be submitted to arbitration in accordance with the procedure provided in the Agreement. In addition, the Secretary-General or the United States may ask the General Assembly to request of the International Court of Justice an advisory opinion on any legal question arising in the course of the proceedings of arbitration. Pending the receipt of the opinion of the court, an interim decision of the arbitral tribunal shall be observed by both parties. Thereafter, the arbitral tribunal shall render a final decision having regard to the opinion of the court.[55]

It has been suggested that the authority of the United Nations to change existing law includes only what would normally come within the sphere of administrative regulations as distinguished from legislative enactments. On the other hand, there are also strong arguments to support the view that there is no such limitation on the power of the United Nations under the Agreement to make regulations within the district for the purpose as defined. Perhaps the reasonable test to apply in determining whether a regulation is authorised by Section 8 is not whether it falls within the category of administrative rules on the one hand or of legislative enactments on the other, but whether it is necessary for the full execution of the functions of the organisation.

It is clear that, in regard to the headquarters district, there is no reliance on the principle of extra-territoriality, although the district is made inviolable by Section 9 of the Headquarters Agreement.

COMMUNICATIONS AND TRANSIT

The General Convention in Sections 11 and 18 provides for the exemption of representatives of Member States to the principal and

[55] Headquarters Agreement, Article 8 (s. 21).

subsidiary organs of the United Nations from 'immigration restrictions'. The Headquarters Agreement, while not referring specifically to 'exemptions from immigration restrictions', lays down in section 11 that the Federal, State or local authorities of the United Nations shall not impose any impediments to transit to or from the headquarters district of representatives of Member States or officials of the United Nations or of special agencies or the families of such representatives or officials. This privilege is also extended to any persons invited to the headquarters district by the United Nations or a specialised agency on official business, as well as representatives of the press and of radio, film or other information agencies, who have been accredited by the United Nations or by a specialised agency in its discretion after consultation with the United States.

In implementation of this section of the Headquarters Agreement, an understanding was reached by the United Nations with the United States authorities regarding the procedure of consultation for accreditation of representatives of the press and of radio, film or other information agencies. It was agreed that under section 11, paragraph 3, of the Headquarters Agreement, the final decision on accreditation would rest with the United Nations. However, all the names of persons proposed for accreditation would be forwarded to the United States Government for comment, final accreditation to take place within a period of two weeks.

CONCLUSION

The above survey of the legal status of the United Nations in the United States does not attempt to discuss all the diverse aspects of the subject. It aims only to present a general picture of the salient problems which are most likely to arise from day to day between the United Nations and the United States. A broader conception of the subject, however, would indicate that not a few questions of absorbing interest to the students of current international law are involved.

RELATION BETWEEN MUNICIPAL AND INTERNATIONAL LAW

In the first place, this subject presents intricate questions on the general theme of the relation of municipal law to international law. As far as international law is concerned, the principle governing the legal status and the immunity of the United Nations was embodied in Articles 104 and 105 of the Charter. The provisions of these two Articles became binding upon all Member States which signed and ratified the Charter. The Preparatory Commission of the United

Nations, as early as December, 1945, invited the attention of the Members of the United Nations to the fact that under Article 105 of the Charter, the obligations of all Members to accord to the United Nations, its officials and the representatives of its Members all privileges and immunities necessary for the accomplishment of its purposes operates from the coming into force of the Charter and is, therefore, applicable even before the General Assembly has made the recommendations or proposed the conventions referred to in paragraph 3 of Article 105.

The Charter, after its ratification by the United States and after its entry into force on October 24, 1945, became, under the Constitution of the United States, the law of the land. Whatever doubt may be entertained as regards certain other provisions of the Charter, there is cogent reason for the view that Articles 104 and 105 are self-executing treaty provisions under American law, and that they do not, therefore, require statutory sanction for their enforcement in American courts.[56] This view was confirmed, as has been seen, in the *Curran Case*.

Although the legal status of the United Nations in the United States is not open to question as a matter of broad principle, the juridical situation is complicated by the co-existence of the several instruments, municipal and international, which have been analysed in reference to specific points. It is clear that, pending the accession by the United States to the General Convention, the positive law applicable in particular situations is contained in the Immunities Act and the Headquarters Agreement. Upon the accession to the General Convention by the United States, the General Convention will likewise become the law of the land.

It has been stated authoritatively by the State Department that there are no conflicts between the Immunities Act and the General Convention.[57] In spite of this general statement, it is not impossible that in a borderline case a court might invoke the provisions of the Immunities Act, or of the Headquarters Agreement, or of the General Convention (after its accession by the United States),

[56] There ought to be no doubt that Articles 104 and 105 would require legislation for their application and enforcement in English courts. See Sir Arnold D. McNair, 'The Method Whereby International Law is made to Prevail in Municipal Courts on an Issue of International Law', in *Grotius Society Transactions for the Year 1944*, p. 19.

In Great Britain, the Diplomatic Privileges (Extension) Act, 1946 (9 & 10 Geo. 6, c. 66) was passed in connection with the General Convention. It extended to the United Nations the privileges as laid down in the Diplomatic Privileges (Extension) Act, 1944 (7 & 8 Geo. 6, c. 44). For comment on the 1946 Act, see Parry, *loc. cit.*, *supra*, note 7.

[57] Letter from the Legal Adviser of the Department of State to the Chairman of the Committee on Foreign Affairs, May 26, 1948. See Report of the Committee on Foreign Affairs on H.R. 6802, p. 15 (June 6, 1948).

provisions relating to the same subject-matter but conflicting with one another. On the assumption that all these three instruments are the law of the land, it will be admitted that according to the recognised rules of interpretation, where treaty provisions and an act of Congress cover the same subject-matter, they should be interpreted, wherever possible, in a manner that would give effect to all the instruments. Where there is an irreconcilable conflict, the last instrument in point of time will prevail. Thus the Headquarters Agreement, approved by Joint Resolution of Congress and brought into force subsequent to the enactment of the Immunities Act, will prevail over any conflicting provisions in the Immunities Act. The provisions of the General Convention, after it becomes the law of the land through the accession of the United States, will likewise override those of the Immunities Act. As between the General Convention and the Headquarters Agreement, however, it is specifically provided in the Headquarters Agreement (Section 26) that in so far as any provisions of both instruments relate to the same subject-matter, they shall be both applicable and neither shall narrow the effect of the other, but in any case of absolute conflict the provisions of the Headquarters Agreement shall prevail.

Assuming for the sake of argument that a subsequent statute passed by the Congress contains provisions inconsistent with the Headquarters Agreement or the General Convention, such a statute, being later in time, would prevail in American courts. None the less, it is clear that the United States is not thereby released from the international obligations which it might have assumed under the Headquarters Agreement and under the General Convention, and that the Federal Government, as the 'societal agent' of the United States, will be held responsible under international law.

THE BASIC THEORY OF IMMUNITIES

Secondly, it is easy to discern that a new approach to the problem of immunity has been adopted in all the instruments under examination. The theory of function as embodied in the maxim *ne impediatur officium* has taken the place of traditional theories in international law as applied to immunities. Outmoded fictions such as extra-territoriality have been discarded in favour of the principle that privileges and immunities are designed to fulfil the needs which the United Nations must serve, in carrying out its functions as set forth in the Charter. Articles 104 and 105 of the Charter set a distinct pattern to which the Immunities Act, the

General Convention and the Headquarters Agreement have sought to conform.

In contrast to the Covenant of the League of Nations and the *Modus Vivendi* with Switzerland, all these instruments have limited the grant of diplomatic immunities in the narrow sense of the term. In the few instances in which diplomatic immunities are granted, it is believed that the approach is mutatis mutandis in line with the modern tendency as exhibited in the observations of the League of Nations Committee of Experts for the Progressive Codification of International Law to the effect that the basis of diplomatic privileges and immunities is ' the necessity of permitting free and unhampered exercise of the diplomatic function and of maintaining the dignity of the diplomatic representative and the State which he represents, and the respect properly due to time-honoured traditions '.[58]

Perhaps the ablest interpretation of the underlying basis of immunities and of the spirit which inspired this approach is contained in the speech made by Sir Hartley Shawcross, Attorney-General of the United Kingdom, before the General Assembly on February 13, 1946, urging the adoption of the General Convention. He said :

> ' It is important that in setting up this great new international organisation we should not ask for it to possess privileges and immunities which are greater than those required for its efficient organisation. That would lead to unnecessary conflicts with the national sovereignty of particular Member States. On the other hand, equally important it is to ensure that it has adequate privileges and immunities. To give too few would fetter the United Nations organisation in the discharge of its tasks. The Charter provides that the immunities and privileges to be granted should be such as are necessary for the fulfilment of its purposes, and that is exactly what this important and historic document does. Within the scope and the ambit of the Charter, this Convention will give the United Nations Organisation in every Member State a sufficient degree of sovereignty in regard to its own affairs to enable it to carry out its functions independently, impartially, and efficiently '.[59]

[58] Committee of Experts for the Progressive Codification of International Law, Report to the Council of the League of Nations on the Questions which Appear Ripe for International Regulation, p. 76 (April 20, 1927).

[59] *Official Records* of the First Part of the First Session of the General Assembly, Plenary Meetings of the General Assembly, January 10—February 14, 1946, p. 452.

THE BALANCING OF INTERESTS

In the third place, the subject under discussion affords a remarkable argument for the necessity of weighing, evaluating, and balancing competing interests, national and international. Inherent in every problem which has been discussed, there are rival interests for recognition and protection. To give a few examples, in connection with the problem of the exemption of American nationals on the staff of the United Nations from income tax, the national interest lies in the absence of a tax-free or privileged class among the citizens, whereas the international interest lies in the equity among the Member States of the United Nations and the equality among its personnel, in addition to the general consideration that the exemption from national taxation protects the independence of the agents of the international community.

In connection with the problem of the exemption of American nationals from obligations of military service, the national interest lies in the exacting of undivided allegiance and loyalty which forms the essence of citizenship. The international interest, on the other hand, lies in the unhampered performance of the duties of an international character entrusted to agents of the international community.

In connection with the problem of the exemption from local jurisdiction of acts performed in an official capacity, the national interest lies in the upholding of territorial sovereignty, which Chief Justice Marshall once described as 'necessarily exclusive and absolute' and not 'susceptible of limitation not imposed by itself'.[60] The same national interest demands that the enforcement of the law of the land must be uniform and without discrimination. As has been shown, the international interest in this exemption lies in the necessity of ensuring the free and unfettered working of international institutions and the complete independence of the agents of the international community from any form of national control.

These instances serve to underline the ever-present competition of rival interests both in the formulation of the rules governing the immunities of the United Nations and in the day-to-day application of these rules. It may be noted that the reconciliation of the opposing interests has been partly achieved in the United Nations Charter, the General Convention, and the Headquarters Agreement.

The implementation of the agreements which have so far been reached as well as the solution of unforeseen problems require a constant and unremitting process of reconciling and balancing

[60] *The Schooner Exchange* v. *McFaddon*, 7 Cranch 116 (U.S.) 1812.

national and international interests. This process must continue in a spirit of understanding and goodwill both on the part of the United Nations and on the part of the Government and authorities of the United States. The United Nations and its officials have made no exaggerated claim to be set apart from the life of the country which extended its hospitality to them through a unanimous vote of the Houses of the Congress on December 10 and 11, 1945, inviting the United Nations to establish headquarters in the United States. The United Nations has asked only for the privileges and immunities necessary for the fulfilment of its purpose and for the exercise of its functions. Within these avowed limits, there is hardly any reason to believe that the reconciling and balancing of national and international interests involved in any or all of these problems, difficult and delicate though they may be, cannot be effected in the conviction that with the recognition and protection of international interests, national interests in a broader sense may also, in the long run, be best subserved.

THE HOLY SEE AND INTERNATIONAL LAW

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The problem of the juristic personality of the Catholic Church has been discussed several times, but the present article is written with the twofold object of clarifying certain controversial issues and of bringing the subject up to date.

At the outset it is necessary to discuss the principle of the territoriality of the State, as according to one view of this principle the question of the Catholic Church as an international person simply does not arise. Put briefly, the view is that international persons must be independent 'inter se', but all who find themselves in the territory of any particular State—including the Catholic Church—far from being independent are subjects of the State, so that no Church can be said to be an international person. This view, which has been held for long enough by many lawyers, goes hand-in-hand with a certain view of territorial sovereignty. The matter is complicated by the fact that when discussing territorial sovereignty it is natural to discuss at one and the same time two meanings—the purely factual and the legal. Yet these two, although intertwined, are distinct. It is a fact that the State succeeds in affirming its sovereignty within its boundaries. The modern centralised State does not find, wherever its writ runs, anybody capable of resisting its authority. But although this authority remains unchallenged, insurrection or subversive parties within a State are capable of threatening its stability. In France, in the second half of the last century, associations of workers continued to display their power in spite of rigorous measures enacted by the State, and in more recent times there are not wanting proofs that Jellineck's 'irresistible power' of the State can be as strongly opposed as any other power on earth. The Catholic Church has always stood against the extreme view of territorial sovereignty; not only are declarations of submission lacking, but there are numerous representations against any possible challenge to her independence. The point must not be overlooked by the supporters of the unconditional sovereignty of the State. In this matter the position of the Catholic Church has been unique. While other organisations which opposed the State have been suppressed or forced to capitulate, that Church and her main body the Holy See, by constantly stressing their independence, have

obliged the secular power to recognise the independence of this, as many might call it, rebellious body. But the doctrine of sovereignty has had its effect and while the State has been forced to give up a degree of territorial claims, the Church has surrendered, on certain issues, to the State.

Territorial sovereignty may have an exclusively legal significance as well. This implies that laws are not concerned with what happens, or does not happen. They merely enact a code of behaviour which the citizens must obey. As a result the laws of the State can command the Church on matters over which the latter would not admit the State had power, while the Church makes laws to confirm her competence on matters over which her authority is hardly felt, without taking into consideration how far her orders are obeyed in practice. But a mere assertion of the abstract doctrine of territorial sovereignty does not, as it does not explain the facts, solve the question of the international personality of the Church.

The consideration of the Catholic Church's conception of her own independence is a no more fruitful line of research. Without undervaluing the important part she has played in the formation of the international order, one cannot burke the fact that that order is, at present, formed by States and for States, and the present consideration prescinds from the idea of a Church with a territorial basis. Nor does a consideration of the canon law solve the problem. That law states what the position of the Church 'should' be both in the national and the international sphere. It lays down certain requirements to which both systems of law—municipal and international—should adhere lest they conflict with divine teaching. But it cannot say whether the laws of various States satisfy those requirements, and we are concerned here with finding what juridical condition is actually attributed to the Catholic Church, even though that condition be against the principles of canon law. In the present international order that condition can best be found by a consideration of how States conceive their relations with the Church in their own internal laws and codes. If these laws consider the Church as subject to their authority, then the international personality of the Church cannot exist. If, on the other hand, they consider the Church as outside their sphere of control, then that international personality is recognised and relations between Church and State fall to be regulated by international law. Independence of, or independence on, internal law, and personality or lack of personality are correlative terms. That independence may arise from the internal constitution of the body recognised—as with the Holy See; or, as happened with the Sovereign Military Order of Malta, and the International Institute of Agriculture in Rome, from the fact

that the State admits that the body concerned is a subject of international law. But if the Church is to be recognised as a subject of international law, what would this mean? Would the subject be the Church or the Holy See—the body comprising not only the Pope, but his auxiliary offices as well? Canon law does not give much help. It stresses the necessity of recognising both the Church and the Holy See—a recognition which would not be reconcilable with the ideas governing international law.

That the Catholic Church (as opposed to the Holy See) has no international personality is a real fact. That Church includes not only ecclesiastics but laymen, too. If the recognition should be extended to the Church, as canon law wishes, then even the individuals who pertain to her body would remain outside the authority of the State, a solution which would never be accepted. The functioning of ecclesiastical institutions everywhere is something allowed by the temporal power, which recognises the difficulty and, in certain cases, the impossibility of curbing them to its will. It remains clear, therefore, that the secular power is not bound by any external legal limitations in its attitude towards the Churches within its territory, except for reasons of internal order. In fact, according to circumstances, the State can give more or less freedom to ecclesiastics and their institutions, a discretion which would not exist if an insurmountable juridical limit were laid down by an international regulation.

Weighty arguments can show how religious institutions in a State cannot consider themselves subjects of international law. There are in the codes and in the legislation of several nations various articles curtailing certain actions of priests, which are regarded as misdemeanours. In claiming complete independence from the civil authorities, the Catholic Church is merely evolving the logical conclusion of her conception as an international personality; on the other hand, the secular power, contrary to the principles of canon law, always refused recognition of that personality 'ipso facto'. A totally different conclusion is reached when one considers the See which always claimed to enjoy a position of complete independence towards States in general, and towards Italy in particular, even when it had no proper territorial basis. Her independence was not simply admitted 'de facto', but openly recognised by the State laws.

The view commonly accepted, that the Holy See can only obtain an international 'status' when a territorial unity is recognised—in this case during the period 1870–1929, she was a dependent subject of Italy—clashes with the facts. Can the Law of Guarantees of May 13, 1871, which gave the Pope recognised prerogatives, be

understood in the light of this opinion? If its personality is denied the Holy See becomes a body of public law, although in a peculiar situation. Previous to 1929, the See was not considered subject to Italian law, but a body with no superior. According to some legal authorities, who tried to trace an analogy between it and other constitutional bodies in Italy, we would have had two distinct organisations, one, the State, dealing with temporal matters and the other, the Church, dealing with purely spiritual ones, in equal juridical positions. As the National Fascist Party, in days gone by, was accorded a particular 'status', as these legal heretics affirmed, similarly the See as the highest body of the Catholic Church, should have been fitted into the constitutional law of Italy. Moreover, with a Law of Guarantees which recognised the right of legation to the Holy See, Italy would have had a constitutional body with complete autonomy, enabling it to establish direct relations with foreign countries. Briefly, had this taken place, there would have been a real constitutional decentralisation. The absurdity of this thesis is proved by one of the cardinal principles in the policy of the old Italian liberal parties; the separation of the powers of the Church and State. The fact that the See remained for a while on Italian territory, and—as will appear later, the present writer does not accept this—is no obstacle to the recognition of her international personality; nor was the fact that her prerogatives were recognised by an Italian law—the Law of Guarantees.

Did the Holy See actually remain on Italian territory? Territorial sovereignty is sometimes withheld from certain bodies. Switzerland, for example, never claimed sovereignty over the League of Nations at Geneva; Italy recognises the independence of the International Institute of Agriculture in Rome. There are, then, institutions over which the sovereignty of the State does not extend, and the Holy See in the period 1870–1929, can be included amongst them. Neither is the character of the municipal Law of Guarantees an argument in favour of the negation of the Holy See's international personality. To say that the prerogatives it enjoyed were a mere concession on the part of Italy and always revocable, is rather hasty reasoning. To fall back on the previous example of the Institute of Agriculture, the immunities of its personnel were actually determined by an Italian law, but no one ever dreamt of declaring that they were a mere concession. The enactment of a certain type of legislation often implies the existence of a particular international situation. It is unthinkable that the State should grant exceptional privileges to a body, if it is not compelled to do so by the rules of international law. No obstacles existed against the recognition of the personality of the See; on the other hand, there are weighty

arguments which go to prove the existence of that personality. As far back as September 8, 1870, a few days before the conquest of Rome, the King of Italy explicitly admitted the independence of the See. In a letter addressed to Pope Pius IX, King Victor Emmanuel II stated that the Holy See was outside the imperium of 'any human power'—a line of policy that was subsequently announced to foreign countries by the Italian Cabinet. In the Lateran Treaty we see how the temporal power had regarded the See for nearly sixty years. Among other things the Preamble states that the contracting parties had recognised the convenience of guaranteeing 'to the Holy See, in a stable way, a "de facto" and "de jure" condition, in order that she may obtain an absolute independence for the accomplishment of her divine mission', and the necessity 'to guarantee to the Holy See a complete and visible independence and a sovereignty unassailable in international law'. It is evident that these statements did not create 'ex novo' the independence of the Holy See. Any other interpretation might distort the question. The study of the jurisprudence of several countries during the 'voluntary captivity' of the Popes leads to the same conclusion; the Supreme Court of Portugal, just to quote an isolated case, on January 13, 1928, deduced from the characteristics of the Holy See her capacity to stand in judgment through her diplomatic agents. However, the most weighty arguments in favour of the personality of the See are the Concordats. Whole libraries have been written on the subject. Various monographs try to prove that Concordats cannot be regarded as international acts, but do not attempt to give evidence to the contrary. To show their juridical nature is not a particularly difficult task. In the first place, Concordats are bilateral acts, never unilateral. An act called 'convention' by both parties, an act for the conclusion of which the parties nominate special delegates, and which acquires validity through the process of ratification, cannot by any means be considered a unilateral act. The theory that Concordats are acts belonging to the jurisdiction of the municipal law of the State is not convincing either. The best evidence to the contrary is that they are drafted in accordance with the procedure required by international law and never by that of municipal law. Concordats have such a small connection with the law of the land, that, once drafted, they produce no legal effect whatever, unless a decree is issued. The Lateran Treaty, for instance, and the Concordat came into effect in Italy only after the promulgation of the law of May 27, 1929, n. 810. If, in past centuries, Concordats might have had sometimes the nature of an international act, and sometimes that of an internal one, as, for example, the Concordat of Worms (1122), the outcome of the

privilegium Callistianum and of the *Praescriptio Henrici V*, this does not alter the fact that a keen legal brain will discover whether this doubt does not arise out of a confusion of terminology. The case is not infrequent where a simple unilateral declaration is called Concordat.

Concordats are particular rules of international law. When States sign them, they do not consider the ecclesiastical bodies referred to in their paragraphs as subject to the power of the See rather than the secular authority; the See simply endeavours to obtain certain treatment in their favour. Concordats must not be put on the same level as treaties between States, which seek to obtain particular treatment for the citizens of one in the territory of the other, but should be compared with the general Conventions by which one State obtains from another an agreement to refrain or limit the exercise of its jurisdiction over its own citizens. A typical example in this respect is the provision contained in Article 34 of the Concordat with Italy of February, 1929. It states: 'Where personal separation is concerned, the Holy See "consents" that they may be judged by the Civil authority'. This paragraph points out that Italy considers an activity of her citizens completely outside her competence. A case of this kind if not unique, is certainly extremely uncommon. In order to understand other rules included in Concordats, one's attention must be focused on the principle that the See is not bound by international law to interfere with bodies or individuals which she considers as belonging to her jurisdiction, although they are treated by both international and internal law as subjects of the State. The nomination of bishops, a matter very often included in Concordats, does not grant an authority which the Church did not previously possess; it simply admits either that the State will not put any obstacle in the path of the See in this field, which she exercises independently of any State concession, or that the State undertakes to give juridical effect within its boundaries to certain acts of the See. On the other hand, when the See assumes ties under a Concordat, these ties generally concern that activity which even according to international law, she is not forbidden to exercise over her flock and her ecclesiastical bodies. Under a Concordat, the See binds herself not to exercise, in one sense or another, that particular activity, which from her point of view, is legal. Hence the existence of the rules by which the See first asks the approval of the secular power for the nomination of bishops, or for the bestowal of ecclesiastical benefices upon individuals not nationals of the State, where the benefice is situated.

It may be stated in conclusion that the general rules of international law consider the ecclesiastical institutions and their

individuals as being completely dependent on the State. This principle, however, is valid only as regards relations between one State and another. The secular power has, indeed, unrestricted freedom to adopt, in connection with individuals and their ecclesiastical bodies, whatever treatment it thinks best; *vice-versa* the See enjoys exactly the same freedom. The predominance of one will over the other is confined by international law to a purely factual matter. One therefore understands how clashes may be unavoidable; hence the extreme utility of Concordats, which are able to limit the respective spheres of influence of each of the contracting parties.

Turning now to the international personality of the Holy See, evidence of its existence is afforded by the Lateran Treaty of February 11, 1929. This treaty is an act of undoubted international nature which even bears the name of an international act; in other words, it assumes the existence of the international personality of both sides. Certain general rules of international law apply to the See, such as those recognising a series of requirements absolutely essential to an international subject. Moreover, the secular power is not allowed to give the help of its judicial arm to a person who might have been damaged by a writ enacted by the See in the exercise of her spiritual functions. The exercise of the jurisdiction of the secular power is barred in the same way as if the matter concerned a writ of another State. The Italian Law of Guarantees gave to the Pope the same prerogatives and personal immunities which are accorded by international law to the heads of foreign countries. The normal rules of international law are in this manner applicable to the See, in the sense that the Powers are bound to observe them. The law of nations, differing from canon law, which declares, as we have already seen, that the whole ecclesiastical organisation should be left outside the temporal power, does not recognise a number of individuals or bodies which are under the authority of the See. In fact, both religious congregations and persons belonging to them remain subject to the authority of the temporal power, and only the State can in international law extend to them diplomatic protection. The protection of Roman Catholics in the Near East, accorded to France by the Holy See, had a moral value, a value in fact, but never a value in international law. That protection was the result of the various Conventions concluded with Turkey and tacitly assented to by the Powers. It was extended, modified, extinguished, according to the agreements signed with these States, and not by any Convention signed by the See. Evidently this was one of the reasons why its international personality was not recognised, whereas this exclusion was rather a limitation of than a denial of that personality.

The Holy See, by establishing diplomatic relations with foreign countries and by signing Conventions with them, both voluntary acts, thus comes within the orbit of international law. She not only has the international capacity to set these acts in motion, but, once performed, to supervise the normal working of these international relations. Two provisions, one of general, the other of particular international law, prove this. The first relates to the provision in the Vienna Convention of March 18, 1815, establishing the Nuncio as the Dean of the Diplomatic Corps in Catholic countries; the other deals with the position of diplomats accredited to the Holy See and obliged to reside in Italian territory. The latter is mentioned in paragraph 2 of Article 12 of the Lateran Treaty : ' The envoys of foreign countries accredited to the Holy See continue to enjoy in the Kingdom [now read Republic] all the prerogatives and immunities which belong to diplomatic agents, according to the rules of international law. Residences may still remain in Italian territory always enjoying their immunities even if the States have no diplomatic relations with Italy '. This clause is not in the least precise; it remains the ' legal Alsatia ' of the treaty.

THE LATERAN TREATY

The Lateran Treaty of 1929 gave juridical recognition to the international personality of the Holy See and the present analysis of the treaty will deal mainly with this aspect of the question. One of the chief aims of the treaty was the constitution of the territorial sovereignty of the See. By acceding to its demands and allowing the establishment of the tiny State known as the ' State of the Vatican City ', Italy's purpose was to settle the Roman Question once and for all. From this territorial basis new rights and obligations arose which are part of the jurisprudence of international law. The Lateran Treaty must not therefore be looked upon as another of those Conventions concluded between the Holy See and other Powers and known as Concordats. Rather should it be compared with the normal treaties concluded between States—in fact, it bears the same titles as they do.

Hardly had the treaty been signed before writers began to theorise about it—particularly did they discuss the question who were the signatories of the treaty. Clearly Italy was one of the signatories but the theories regarding the other contracting party may be reduced to four :—

(1) The treaty was signed by the State of the Vatican City. The Holy See intervened only as the supreme organ of the State, or probably as its representative, but never as a spiritual body ; (2) the

treaty was concluded with the Holy See as the spiritual and the highest body of the State of the Vatican City. In this theory the contracting parties were three—Italy, the Holy See, and the Vatican City through its representative, the Holy See; (3) the treaty was concluded exclusively with the Holy See, representing both the spiritual and temporal powers recognised by the treaty, and (4) the treaty was concluded with the Holy See alone as a separate and distinct body of the State of the Vatican City. This latter, accordingly, is considered as existing in itself but not as actually participating in the treaty.

Before discussing further these doctrines, two points may be made. In the first place the Holy See had an international personality even before the Lateran Treaty; moreover, even before the treaty, a Vatican State was in existence.

The view that a Vatican State existed uninterruptedly from 1870 to 1929, was upheld by Professor D'Avack, of the University of Florence, in a very detailed analysis of the situation. Several other writers cite the Theodoli-Martinucci dispute, brought before an Italian court by an employee of the Vatican administration for works done by him in the Vatican palaces. On that occasion, the See claimed that the dispute was outside the jurisdiction of the Italian courts, and for this reason appointed two commissions composed of prelates to decide all controversial issues arising between the Palatine administrations. Soon after the dispute, a note was sent by the Vatican Secretary of State to the Diplomatic Corps accredited to the Pope stating that: 'When the invaders occupied Rome on September 20, 1870, they respected the boundaries of the Vatican where the Holy Father with his Guards, his Ministers, surrounded by the love and faith of his subjects, continued to exercise all those rights of which he was invested before September 20: in other words, if "stricto jure", he never renounced his title of Sovereign of Rome and of the States of the Church, similarly he still remained in the same position within the boundaries of the Vatican'.

What Italy thought of the See during all those years is mirrored in the speeches of the Italian Premier of the time, which were delivered soon after the signature of the treaty. He stated: 'The Law of Guarantees had created as to three-quarters a sovereignty "de jure", and for the rest a sovereignty "de facto". Within the Vatican territory in which the Pope lived after 1870 no governmental action was ever exercised affirming its power. The Bronze Gates were never crossed by Italian authorities; that was not the threshold of a palace, but the border of a State'. The provisions of the Lateran Treaty, corroborating the idea of Professor D'Avack, prove the existence of a territorial sovereignty of the See before 1929.

Article 3, read in connection with Article 2, shows that territorial rights were simply recognised and not attributed to the Holy See. Moreover, paragraph 2 of Article 26 presumes already the existence of the State of the Vatican City. Article 5, by stating that before the ratification of the treaty, Italy will free the Vatican territory from all sorts of ties and from all possible occupants, and the Holy See, on her part, will manage to close up their access, presumes that a sovereignty of the Holy See existed before the treaty. The analysis of D'Avack upset the established view that the Holy See actually lost her sovereignty after 1870, but acquired it again with the Lateran Treaty.

This view was maintained by the Italian Government for reasons due mainly to one of the cardinal points of her policy, the separation of State and Church, and resulted in the contention that the Papal States were destroyed by 'debellatio' in 1870. It invoked in favour of this contention the international principle that total and material occupation of a territory is not indispensable for 'debellatio'. If the Vatican palaces were not occupied by the troops of Cadorna, so several lawyers reasoned, that portion of territory on which the Pope lived did not compromise the Italian occupation of the Vatican State. This concept was universally sponsored and largely accepted. Jurists failed to see that no State could ever have existed in a few palaces and a small garden. So minute a territory was nevertheless governed quite independently by the See, whose power does not emanate from material elements only. On that garden and on that palace, the State of the Vatican City was more or less shaped. It proved in the long run so successful a solution that the experts of Lake Success are now considering it as a model for the future buildings of the UNO. Briefly, Italian sovereignty was extended purely theoretically over that minute territory, in contrast with the reality of facts and the principle of 'debellatio'. The Lateran Treaty was not concluded between Italy, a body endowed with territorial sovereignty, and the Holy See, a body deprived of that personality and receiving as a 'donation' whatever the former wished to concede, but between two bodies enjoying equal rights. The treaty does not 'revise' the Roman Question, but finally concludes it by resolving all those points upon which both parties, up to then, had not succeeded in reaching an agreement. It could be compared to a peace treaty. The financial convention annexed to it has all the characteristics of those conventions so frequent in peace treaties, whenever a territorial concession takes place.

Reverting to the identification of the body which signed the Lateran Treaty, there is no doubt that the Holy See alone, in her quality of spiritual body, participated in its signature. The State

of the Vatican City could not possibly be one of the contracting parties because the constitution of the State was a consequence and not a premise of the treaty, as shown by Article 3. The following extracts from the pact bear out this thesis:—the Preamble: 'in order to assure to the Holy See her absolute and visible independence'; Article 24: 'the Holy See in connection with the sovereignty due to her in the international field'; Article 26: 'the Holy See thinks that the agreements signed today adequately guarantee her whatever is necessary for the provision of due freedom and independence for the pastoral government of the Dioceses of Rome and of the Catholic Church in Italy and all over the world'.

As the State of the Vatican City was created by the treaty, it is very important to see what kind of relation exists between the See and the Vatican State. To begin with, the Vatican State is a body of its own, quite distinct from that of the See. The laws concerning the State of the Vatican City clearly reveal the determination of the See to constitute an independent legal system, in which each competence is clearly determined. The Pope himself cannot avoid this rule and receives his competence not from canon law, but from Article 1 of the fundamental law of the State of the Vatican City of June 7, 1929. This conception was not merely confined to the will of the Holy See, but obtained full recognition from Italy too. In fact, after having acknowledged in Article 2 'the sovereignty of the Holy See in the international field', Italy, in Article 26, 'recognises the State of the Vatican City under the sovereignty of the Pope'. In other words, there are two separate recognitions, the second of which actually refers to the Vatican City. It is important to realise that the State has concluded several agreements with Italy as well as with other foreign Powers, underlining in this way her personality as an independent body. In examining the relations between the two bodies, adequate consideration must be given to those particular juridical institutions known as vassal States. The Christian States and Egypt, which in the last century were dependent on Turkey, and the Colonies of the British Empire before acquiring their complete independence, were in this category. In the case of 'vassal States', the suzerain grants a certain degree of independence to a part of the territory which, although remaining bound to the central government by its internal law, has nevertheless attained such a degree of independence of the suzerain State as to be able to develop an autonomous activity, thereby possessing a separate and distinct international personality. The State of the Vatican City, in its relation to the Holy See, belongs to this category. Its fundamental laws are not original laws as are those of sovereign States, but are laws issued by the Pope in his position

of head of the Church, and emanating exclusively from him. The State of the Vatican City derives its constitution from the system of the Catholic Church and from her superior body, the Holy See. A graphic example might help to understand the inter-relation between the two bodies. In the ' Acta Apostolicae Sedis ', the laws concerning the Vatican are published separately from those of the Catholic Church. The head of the State is the Pope who is, at the same time, the supreme head of the Holy See. Comparing this case with some other institutions of international law, there is a striking likeness to a royal union though it is not totally identical. There is a far greater similarity to that particular form of royal union which existed between Prussia and the German Empire when the King of Prussia was at the same time the German Emperor, in other words, head of two bodies, one dependent on the other. This dependent relationship was not only recognised but expressly desired by Italy. In Article 26, as already mentioned, Italy did not merely recognise the sovereignty of the Pope over the Vatican City, but throughout the treaty, the dependence of the temporal body on the spiritual one is ever present. As the See was a contracting party to the Lateran Treaty, the Vatican City was ' a res inter alios acta '. The body which should have had a paramount position in the pact remained outside it. Admitting in the abstract the validity of the theory which stresses that international subjects have no other obligations except those which they themselves have contracted, undoubtedly that point concerns exclusively those States which are totally independent, and not those which are considered dependent on others. In particular, when a State grants a degree of autonomy to one of its territories and permits the establishment of independent international relations, this newly assumed ' status ' cannot serve as a pretext for provoking a change in the international obligations already binding on the suzerain. A case might illustrate the point. In the *Case of the Lighthouses of Crete and Samos*, decided in 1937 by the Permanent Court of International Justice, France and Greece did not entertain any doubt that the international obligations contracted by the Turkish Empire were still valid even after the islands had become autonomous. It is not surprising, therefore, that the Vatican City should find itself invested with international rights as a result of the activity of the Holy See. With the signature of the Lateran Treaty all those obligations contracted by the See were, according to the practice mentioned, passed on to the new subject. The right of territorial sovereignty would remain meaningless if referred exclusively to the Vatican State. That right would be extinguished if the Vatican State should one day be completely destroyed by

'debellatio'. In the case of the Holy See, supposing the hypothetical destruction of the State, her survival would never be questioned. Various Articles of the Italian fundamental laws of June 7, 1929, constituting the State of the Vatican City, for instance, Articles 3 (paragraph (*c*)), Article 5 (paragraph (*c*)), Article 20 (paragraph (*c*)), and some of the conventions signed by the Vatican with Italy—the monetary one of 1930 is often quoted—show that the Vatican acted as a sovereign State through its organs. In other words, having both internal and external jurisdiction, one would have a dependent State different from those already known. In fact, in those territories where there are two bodies dealing with similar matters, one is bound to curtail the competence of the other; in the present case, where the superior body, the Holy See, concerns itself with spiritual matters, the Vatican finds itself raised to the rank of State with all its attributes.

The rights of the Vatican City are very strictly defined in the Lateran Treaty. Italy either binds herself to refrain from extending her jurisdiction over the territories subject to the sovereignty of the See (Article 4 of the treaty) or, always with reference to the See, agrees to adopt a certain attitude towards the future State of the Vatican City (Article 24). This treaty bears a striking resemblance to those conventions whereby States stipulate in favour of third parties. The obligations of the See, as already stated, consist in shaping the Vatican State in a determined form. The execution of these provisions remains implicit in the fact that the Pope is the supreme authority, and can, in every single case, set in motion the machinery of the State in accordance with the obligations undertaken by it. This explains various omissions in its constitution; for instance, no mention is made of the territorial limits of the Vatican City. Certain subjects, such as the law on nationality, were dealt with for internal rather than international reasons.

Before going any further, Article 24 needs adequate consideration. It runs as follows: 'The Holy See, according to the sovereignty due to her, even in the international field, declares that she wants to remain and will remain outside temporal disputes between the other States, and remain aloof from all international meetings held for that object, provided that the contending parties appeal to her peaceful mission, reserving, however, to herself the right to impose her moral and spiritual power. In consequence the Vatican City will always be considered a neutral inviolable territory'. Although there is an inaccuracy in its terms—when it links together the Holy See with other States—the importance of the Article may be readily seen. The See will continue to exercise her activity in international relations for spiritual ends in harmony with her nature, yet she

will not take advantage of her territory or of her State to display political activity towards any other Power. The international activity of the State of the Vatican City must be determined exclusively by juridical reasons, never by political ones. Italy, on her part, recognises the inviolability of the Vatican.

The other Articles of the treaty specify places and persons over which the sovereignty of the Holy See is extended. Article 3 and the first 'annex' determine with great precision the boundaries of the Vatican City. The rights of both the Holy See and the Vatican City within these boundaries are similar to the territorial sovereignty accorded by international law to other States. However, certain restrictions on her sovereignty, not in accordance with the general rules of international law, are enacted in Article 3, paragraphs 2 and 3, concerning St. Peter's Square: 'It is understood that St. Peter's Square, although part of the territory of the Vatican City, shall normally continue to remain open to the public and will be subject to the authority of the Italian police and civil servants. They will not advance beyond the entrance to the stairs of the Basilica, which shall remain accessible to the people for worship, and will refrain from climbing them and entering the Basilica, unless they are invited by the competent authority. If the Holy See, in view of particular functions, might temporarily deprive the public from entering St. Peter's Square, the Italian authorities, unless invited by the competent authority, will retire beyond the external limits of the Berninian colonnade and its prolongation'.

The second restriction to the territorial sovereignty of the See is contained in Article 18: 'The scientific and art treasures in the Vatican City and the Lateran Palace will remain on show to scholars and visitors. To the Holy See, however, is left complete freedom to regulate the access of the public'.

On her part Italy has undertaken certain obligations, regarding her territories on the confines of the City. In Article 7, the State undertakes to forbid construction of buildings round them. Moreover, Italy, in Articles 13 and 14 of the treaty recognises the See's rights of ownership over the Patriarchal Churches of St. John Lateran, of St. Mary Major, of St. Paul with its annexes, the edifice of St. Callisto near St. Mary in Trastevere, and of the Papal palace of Castel Gandolfo with all its dependencies. The Italian State also agreed to the transfer to the See of the property of Villa Barberini in Castel Gandolfo, of the buildings in the zone north of the Gianicolo and of the ex-monasterial buildings annexed to the Church of the XII Apostles and to the Church of St. Andrew della Valle and of St. Charles di Catinari. All these immovable properties,

in addition to those where Papal Institutes have their seat, cannot be subject to expropriation for reasons of public utility, except if an agreement is previously reached with the See. They are also exempt from taxation (Article 16). The immunities accorded to the residences of diplomatic agents (Article 15) are applicable to all these buildings, excluding the Papal Institutes and the ex-monasterial edifices. The existence of these immunities was weakly challenged by defending counsel for Signor Caruso in 1944, when the latter was on trial for crimes against humanity. His indictment included the violation of the annexes of St. Paul's. Identical immunities are enjoyed by the Palace of the Dataria, of Propaganda Fide and of the Holy Office. In addition, the immunities are extended to all churches, even outside Rome, at all times when religious ceremonies are celebrated with the intervention of the Pope.

The treaty contains an important provision relating to the acquisition of Vatican citizenship which is made to depend on stable residence inside the Vatican City (Article 9). Cardinals, if resident in Rome, are Vatican citizens (Article 20). There is no citizenship acquired by birth, but merely that which takes into account the residential factor. Once residence ends, citizenship expires. A bearer of a Vatican passport enjoys the same treatment as any citizen of any State.

The Article dealing with criminal jurisdiction also deserves consideration. Article 22 says : ' At the request of the Holy See or by a power of delegation either in single cases or permanently, Italy, on her territory, provides for the punishment of crimes committed in the Vatican City, unless the accused takes refuge in Italian territory, in which case, he will be proceeded against according to Italian laws. The Holy See will hand over to the Italian State persons who take refuge in the Vatican City, accused of acts committed on Italian territory which are regarded as crimes by the laws of both States. The same action will be taken against those persons, who take refuge in the buildings declared immune by Article 15, unless those in charge prefer to invite Italian authorities to arrest them '.

This Article shows the desire, on one hand, of the Holy See to free herself from the burden of exercising her criminal jurisdiction, and on the other hand, the willingness of Italy to exercise in its widest sense, both in her own interests and those of the Holy See, that same jurisdiction for crimes committed in the Vatican City. The very wide right of extradition given to Italy finds no counterpart in that given to the Holy See. On the contrary, when the treaty recognises Italy's right to punish a culprit directly and the See goes so far as to hand him over to Italy, one sees the implication

of this rule which is opposed to the rules of international law. These exceptional powers of criminal jurisdiction raise the question which is very often debated, whether analogous powers are allowed to Italy in St. Peter's Square, which is controlled, as already mentioned in Article 3, by the Italian police forces. The problem raises the question whether, once the accused is in the hands of the Italian police, they have the right to hand him over to the Italian or to the Vatican judicial authorities. Examination of the treaty suggests that the latter solution would be better, as no particular rights are given to Italy in St. Peter's Square, but, by invoking Article 22, this solution can be rejected. There is no difference between a crime committed in the Square and one committed in a foreign country. The Holy See is under obligation to extradite a culprit if the two following conditions exist: (1) The act has been committed on Italian territory, and (2) the act is considered criminal by the laws of both countries.

In conclusion, a few words may be said about the Concordat, which was signed simultaneously with the Treaty, and the Financial Convention. [The financial clauses were discharged immediately and are no longer effective.]

The simultaneity of the two documents, the similarity of their contents and the solution of the Roman Question, which both strive to achieve, made people wonder why the two documents, although distinct and separate, could not be considered inter-related, since the eventual extinction of one may bring about the extinction of the other. Pope Pius XI clarified this idea with the historical phrase 'simul cadent, simul stabunt'. It is possible, however, that though the non-existence of one of the two documents might influence some of the provisions contained in the other, both documents could still bear a substantial value, independently of each other. The fact that they are not rescindable is due not to objective, but subjective causes, derived from the will of the parties and their intention to inter-relate one pact with the other. Those authors who have examined this intention of the parties from the standpoint of private law rather than of international law, have necessarily arrived at divergent conclusions.

The law of nations permits a particular kind of sanction against offences known as reprisals. Reprisal implies the unilateral denunciation of a convention against the offender. In the case of a group of conventions signed simultaneously between two international subjects, if one party illegally denounces a convention, it is always open to the other to denounce the other conventions by way of reprisal. The importance of the 'rebus sic stantibus' clause in international law also deserves some consideration. It is understood

that the clause can always be invoked, in the case of one convention, stipulated simultaneously with other conventions, as in the case of the Lateran Pacts.

The new Constitution of the Italian Republic has regulated the position of both Church and State in Article 7. It runs as follows: 'The State and the Catholic Church are, in their own sphere, independent and sovereign. Their relations are regulated by the Lateran Pacts. The modification of the pacts accepted by both sides, does not require a process of constitutional revision'. The Lateran Pacts were inserted in the new 'Statute'. Their future depends entirely on the political evolution of the Italian Republic. A fierce legal battle will certainly be initiated, if ever a left wing group comes to power, on the provisions of Article 29 of the Italian Constitution, and of Article 34 of the Concordat which relate to marriage. Even in 1929, this thorny argument proved to be the 'crux' of the preliminary discussions. Several legal authorities consider it, unjustly, a grave infringement of Italian sovereignty, but it still remains the interrogation mark of the pacts.

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THE RECOGNITION OF FOREIGN JUDGMENTS UNDER A FULL FAITH AND CREDIT CLAUSE II—A FURTHER COMMENTARY

By Zelman Cowen, b.c.l., m.a., ll.m.

In the 'ill-starred'[1] *Haddock* v. *Haddock*,[2] Holmes J. remarked that he did 'not suppose that civilisation will come to an end whichever way this case is decided'. In recent cases involving the recognition of divorce decrees of sister States, and the effect of full faith and credit provisions thereon, American judges have derived solace from the repetition of this dictum.[3] Though civilisation may remain unshaken by the judicial pronouncements on this vexed subject, lawyers may perhaps be permitted some expression of uncertainty and unhappiness in the present state of the law. In an earlier discussion of this problem,[4] the present writer discussed cases in which the Supreme Court of the United States and an Australian (Victorian) Court had arrived at differing conclusions on the operation of substantially similar full faith and credit provisions.[5]

In *Williams* v. *North Carolina* (*No.* 2),[6] the Supreme Court of the United States, by a majority, held that full faith and credit provisions did not oblige North Carolina to recognise a Nevada divorce decree in a case in which Nevada had assumed jurisdiction on the footing that the petitioner was domiciled in that State, when in the opinion of the North Carolina court, it could be shown that

1 *Sherrer* v. *Sherrer*, *Coe* v. *Coe* (1948 Supreme Court of U.S., not yet reported), *per* Frankfurter J. dissenting.

2 201 U.S. 562, 628.

3 *Williams* v. *North Carolina*, 325 U.S. 226, 243; *per* Murphy J., *Sherrer* v. *Sherrer*; *Coe* v. *Coe* (1948, not yet reported), *per* Frankfurter J.

4 'The Recognition of Foreign Judgments under a Full Faith and Credit Clause', 2 *International Law Quarterly*, 21.

5 For the United States, Act IV, s. 1 of the Constitution provides that full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State. It further provides that Congress may prescribe the manner in which such Acts, etc., shall be proved and the effect thereof. An Act of Congress was passed in 1790. The Constitution of the Commonwealth of Australia, s. 118, makes provision similar to Art. IV, s. 1 of the U.S. Constitution. Also, the State and Territorial Laws and Records Recognition Act, 1901–28, provides that the judicial proceedings of any State or territory shall, if proved in the manner specified, be given such faith and credit in every court, as they have by law or usage in the courts of the State or territory in which they were originally taken.

6 326 U.S. 226.

the petitioner was not in fact domiciled in Nevada. Frankfurter J.[7] stated the majority view:

> 'The decree of divorce is a conclusive adjudication of everything except the jurisdictional facts upon which it is founded, and domicile is a jurisdictional fact. To permit the necessary finding of domicile by one State to foreclose all States in the protection of their social institutions would be intolerable.'

In the *Williams Case*, the question arose in criminal proceedings. The parties, who had obtained Nevada divorces, remarried in Nevada and then returned to North Carolina. They were prosecuted for bigamy in North Carolina, and the success of the prosecution depended upon establishing that the Nevada divorces were invalid. In the Victorian case of *Harris* v. *Harris*[8] the validity of a New South Wales divorce was in issue in deciding whether a Victorian court had jurisdiction to entertain a petition for divorce from a second marriage entered into by one of the parties to the New South Wales divorce proceedings. The learned judge, Fullagar J., held that the relevant full faith and credit provisions obliged him to recognise the New South Wales decree. The only material question was whether the New South Wales decree was final and conclusive in that State; if so, it was not possible to question the validity of the decree in Victoria on the ground that the New South Wales court had improperly assumed jurisdiction. The *Williams Case* was cited to the judge, who expressly declined to follow it.

In both the *Williams* and the *Harris Cases* the challenged decrees were made in undefended proceedings. In the *Williams Case*, three judges dissented; Rutledge, Black and Douglas JJ. One of the main points of dissent, stated with particular force in the judgment of Black J., in which Douglas J. concurred, was that as the divorce and remarriage, which both took place in Nevada, were valid in that State, the plain meaning of *full* faith and credit was that all sister States should recognise the Nevada decree.

The learned judge stated this view in the following terms[9]:

> 'The court today, however, seems to place its holding that the Nevada decrees are void on the basis that the Due Process Clause makes domicile an indispensable prerequisite to a State court's "jurisdiction" to grant divorce. It further holds that this newly created federal restriction of State courts projects fact issues which the State courts cannot finally determine for

[7] 326 U.S. 226, 232.
[8] [1947] Argus L.R. 106.
[9] 325 U S. 226, 271. Italics supplied.

> themselves. *Davis* v. *Davis*, 305 U.S. 32, provides a possible exception to this holding. It decided that where both spouses appeared, a State court could finally determine the question of domicile. Whether the court today overrules that case, I cannot be sure. Certainly, if a State court cannot finally determine the question of domicile because it is a federal question, *each divorce controversy involving domicile must be subject to review here whether both parties appear or not.*'

In the light of the italicised words, which, it is respectfully submitted, seem logical enough, it is interesting to note a passage in the majority judgment of Frankfurter J.[10]:

> 'It is one thing to re-open an issue that has been settled after appropriate opportunity to present their contentions has been afforded to all who had an interest in its adjudications. This applies also to jurisdictional questions; *Davis* v. *Davis*. But those not parties to a litigation ought not to be foreclosed by the interested actions of others.'

This passage is of particular interest when compared with the views expressed by Frankfurter J. in his later (dissenting) judgment in *Sherrer* v. *Sherrer* and *Coe* v. *Coe*. While, in view of the later cases, too much stress should not be placed on the passage cited from the *Williams Case*, it seems at least possible from that passage that the learned judge might have taken a different view in that case, if the Nevada decree had not been ex parte.

It may here be noted that in *Davis* v. *Davis*,[11] cited both by Frankfurter and Black JJ. in the passages quoted, the question for the Supreme Court was whether a contested Virginia divorce decree was entitled to recognition in the District of Columbia. The wife contested the Virginia proceedings, pleading to the jurisdiction on the ground that the husband was not a bona fide resident of that State. The question of jurisdiction was referred to a commissioner in chancery who reported that he had heard all the evidence submitted by both parties, and that, in his opinion, the court had jurisdiction as the husband was a bona fide resident of Virginia. The wife filed exceptions to this report, and the Virginia court in the subsequent proceedings heard counsel for both parties and held that it had jurisdiction. The husband later instituted proceedings in the District of Columbia to have a previous decree of judicial separation which had been granted there, and which provided for alimony and for custody of the child of the marriage, set aside on the ground of the Virginia decree dissolving

[10] *Ibid.* at p. 230.
[11] 305 U.S. 32.

the marriage. The wife pleaded, inter alia, that the Virginia decree was void for want of jurisdiction. This plea was rejected. As Butler J., delivering the judgment of the Supreme Court, said:[12]

> 'She may not say that he was not entitled to sue for divorce in the State court, for she appeared there and by plea put in issue her allegation as to domicile, introduced evidence to show it false, took exceptions to the commissioner's report, and sought to have the court sustain them, and uphold her plea. Plainly the determination of the decree upon that point is effective for all purposes in this litigation.'

In *Esenwein* v. *Commonwealth*,[13] a decision of the Supreme Court in which judgment was delivered on the same day as in the *Williams Case*, a further perplexity appears. The petitioner, in reliance on an ex parte Nevada divorce decree, applied to a Pennsylvania court for revocation of a Pennsylvania order for support of his wife. It was unanimously held by the Supreme Court that the Pennsylvania court was justified in finding that the petitioner did not have a bona fide domicile in Nevada when he obtained his divorce decree, and that, therefore, the full faith and credit provisions did not oblige Pennsylvania to recognise the decree. Frankfurter J. pointed out that by Pennsylvania law, a support order did not survive a decree of divorce. The question was, therefore, whether the Nevada decree was valid. Here there was an ex parte Nevada decree, and while full faith and credit required that Pennsylvania should treat the Nevada decree as prima facie valid, there was 'convincing countervailing evidence'[14] that Nevada lacked jurisdiction, so that the decree need not be recognised in Pennsylvania.

So far, the position adopted by Frankfurter J. was perfectly consistent with his judgment in the *Williams Case*. But the perplexity arises from the separate concurring judgment of Douglas J. in which Black J. concurred. This judgment is so interesting that it may be quoted at some length.[15]

> 'I think it is important to keep in mind a basic difference between the problem of marital capacity and the problem of support. We held in *Williams* v. *North Carolina*, 317 U.S. 287,[16] that a Nevada divorce decree granted to a spouse domiciled there was entitled to full faith and credit in North Carolina. That case involved the question of marital capacity. The spouse who obtained the Nevada decree was being

[12] At p. 40.
[13] 325 U.S. 279.
[14] At p. 281.
[15] At pp. 281–3.
[16] The *first* of the two *Williams Cases*.

prosecuted in North Carolina for living with the one woman whom Nevada recognised as his lawful wife. Quite different considerations would have been presented if North Carolina had merely sought to compel the husband to support his deserted wife and children, whether the Nevada decree had made no provision for the former wife and children or had provided an amount deemed insufficient by North Carolina. In other words, it is not apparent that the spouse who obtained the decree can defeat an action for maintenance or support in another State by showing that he was domiciled in the State which awarded him the divorce decree. It is one thing if the spouse from whom the decree is obtained appears or is personally served. See *Yarborough* v. *Yarborough*, 290 U.S. 202; *Davis* v. *Davis*, 305 U.S. 32. But I am not convinced that *in absence of an appearance or personal* service [17] the decree need be given full faith and credit when it comes to maintenance or support of the other spouse or children. The problem under the full faith and credit clause is to accommodate as fully as possible the conflicting interests of the two States. The question of marital capacity will often raise an irreconcilable conflict between the policies of the two States. See *Williams* v. *North Carolina*, *supra*. One must give way in the larger interests of the federal union. But the same conflict is not necessarily present when it comes to maintenance or support. The State where the deserted wife is domiciled has a deep concern in the welfare of the family deserted by the head of the household. If he is required to support his former wife, he is not made a bigamist and the offspring of his second marriage are not bastardised.'

Rutledge J. in a separate concurring judgment made three points: (1) in accordance with the views he had expressed in his dissent in the second *Williams Case*, he did not consider that full faith and credit was given by Pennsylvania to the Nevada decree here; (2) the majority decision in *Williams* led him to concur in the result in this case; (3) in so doing, he expressed concurrence with the view of Douglas J. 'that the jurisdictional foundation for a decree capable of foreclosing an action for maintenance or support in another may be different from that required to alter marital status with extra-territorial effect'.[18]

Black, Douglas and Rutledge JJ. were the dissenting judges in the second *Williams Case*. Rutledge J. acknowledged in his

[17] Italics supplied.
[18] 325 U.S. 279, 283.

judgment in the *Esenwein Case* that the result in that case was that Pennsylvania did not accord *full* faith and credit to the Nevada judgment, in the sense in which full faith and credit had been interpreted by the dissenting judges in the *Williams Case*. But Douglas and Black JJ. who had taken a most uncompromising view of the obligations of a State under the full faith and credit clause in the *Williams Case*, apparently felt no doubt about the result in the *Esenwein* decision. In that case, as we have seen, the question whether the Nevada decree must be recognised by Pennsylvania was the only point of substance for the court. And there, where the issue was the provision of support for a deserted wife, it was said that 'the problem under the full faith and credit clause is to accommodate as fully as possible the conflicting interests of the two States'.[19] As the State in which the deserted wife was domiciled had a deep concern for her welfare, the obligation to accord full faith and credit was subject to a right in the court which was called upon to accord recognition to determine whether the Nevada court had validly assumed jurisdiction. In such case, Douglas and Black JJ. were prepared to permit the Pennsylvania court to import domicile as an 'indispensable prerequisite to a State court's jurisdiction',[20] and hence as an indispensable prerequisite to the grant of recognition under the full faith and credit provisions. Moreover, the *Esenwein Case* suggests another difficulty. Douglas J. apparently confined the rule to cases where there was not 'appearance or personal service',[21] that is to say to ex parte decrees.

To one not versed in the intricacies of American constitutional law, the positions adopted by Black and Douglas JJ. in the *Williams* and *Esenwein Cases* raise some difficulty. It is difficult not to agree with a learned commentator that the result seems to be that the 'irreconcilable conflict' between two States on the question of marital status is not so insuperable in dealing with matters of money. It is less irksome to support two wives than to go to gaol because of them.[22] It is also difficult not to agree with the same writer when he remarks that it is surprising, in view of the position taken up by Black J. in the *Williams Case*, that Douglas J., having regard to his judgment in the *Esenwein Case*, should have concurred with Black J. in the *Williams Case*, and that Black J. should have concurred with Douglas J. in the *Esenwein Case*!

[19] 325 U.S. 279, 282.
[20] *Williams* v. *North Carolina*, 325 U.S. 226, 271.
[21] 325 U.S. 279, 282.
[22] T. R. Powell, 58 H.L.R. at 958.

The position thus far may be briefly summarised. (1) If either the petitioner or the respondent has acquired a bona fide domicile in the State in which a decree of divorce has been pronounced, the full faith and credit provisions require that recognition be accorded to the decree by a sister State. The authority for this is the first *Williams Case*.[23]

(2) Where an ex parte decree of divorce has been pronounced by a State on the footing that the petitioner was domiciled there, a sister State may inquire whether the court which pronounced the decree validly assumed jurisdiction before and as a condition of the grant of recognition. The authority for this is the second *Williams Case*. Black, Douglas and perhaps Rutledge JJ. would apparently restrict this latter proposition to cases involving support for a deserted wife.

(3) *Andrews* v. *Andrews*,[24] is authority for the proposition that notwithstanding the fact that both parties appear or consent to the jurisdiction of a State court which pronounces a decree of divorce, a sister State is not obliged to accord recognition if it is satisfied that neither party was domiciled in the State which granted the divorce. 'The fact that both plaintiff and defendant have appeared in a divorce suit will not entitle the decree to recognition if in fact there was no domiciliary jurisdiction. Divorce jurisdiction is not a personal matter to be conferred by consent of the parties'.[25] The logic of this view was endorsed by Black and Douglas JJ. in their dissenting judgment in the second *Williams Case*. There they pointed out that if a question might be raised as to jurisdiction in a full faith and credit issue, it could not turn simply on the question whether the original proceedings were ex parte. Yet the same judges in the *Esenwein Case* suggested in a 'support' case that the jurisdictional issue might be raised in the 'absence of an appearance or personal service'.[26] And to add a further complication, Frankfurter J., one of the majority in the second *Williams Case*, suggested that it was not possible to re-open the issue of jurisdiction after 'appropriate opportunity to present their contentions has been afforded to all who had an interest in its adjudication'.[27]

How far these dicta of individual judges were expressed with a full awareness of the decision of the Supreme Court in *Andrews* v.

[23] 317 U.S. 287.
[24] 188 U.S. 14.
[25] This rule based on *Andrews* v. *Andrews* is stated by Gooodrich, *Conflict of Laws* (2nd ed.), p. 337. See also Stumberg, *Conflict of Laws*, p. 269. Beale, *Conflict of Laws*, Vol. 1, p. 476.
[26] 325 U.S. 279, 282.
[27] 325 U.S. 226, 230.

Andrews is not quite clear. However, this particular problem has been squarely faced by the court in the two recent cases of *Sherrer* v. *Sherrer* and *Coe* v. *Coe*. In the former case, the petitioner married the respondent in New Jersey and lived with him in Massachusetts for several years. She then left Massachusetts for Florida, ostensibly for holiday purposes, taking the children with her. Soon afterwards, she informed her husband that she did not intend to return to Massachusetts, and she obtained employment and accommodation in Florida. Subsequently, she petitioned for divorce in Florida, alleging that she was a bona fide resident of that State. The respondent received notice of the suit, entered a general appearance, and denied the allegations of residence. Throughout the proceedings the respondent was represented by counsel and personally gave evidence of an agreement between the parties relating to the custody of the children. He did not, however, cross-examine or tender evidence in rebuttal of the allegations, including that of the petitioner's residence in Florida. The court pronounced a decree after specifically finding that it had jurisdiction, as the petitioner was a bona fide resident of Florida. Subsequently the petitioner married another man in Florida, and returned with him to Massachusetts. The respondent subsequently instituted proceedings in Massachusetts in which he alleged that the Florida decree and the subsequent marriage of the petitioner were void, and sought a declaration that he might be permitted to convey his real estate as if he were sole, and that he was living apart from his wife for reasonable cause. The petitioner joined issue on these allegations. The court of first instance held that the petitioner was never domiciled in Florida, and granted the respondent the relief requested. This decision was upheld by the Supreme Judicial Court of Massachusetts which held that the requirements of full faith and credit did not preclude the Massachusetts court from re-examining the finding of domicile made by the Florida court. This decision was reversed by the Supreme Court of the United States, Frankfurter and Murphy JJ. dissenting.

In *Coe* v. *Coe* the issues were substantially similar. There a husband went from Massachusetts to Nevada, and petitioned for divorce there, alleging that he had come to Nevada with the intention of making it his permanent home. The wife appeared in person, and was represented by counsel, but raised no question as to the husband's domicile. The Nevada court held that it had jurisdiction, and granted a decree to the wife on her cross-complaint. In subsequent proceedings in Massachusetts, the wife petitioned the court for a decree that the husband be adjudged in

contempt of court for failure to comply with a decree for separate support of the wife which had been made before the husband left Massachusetts for Nevada. She also petitioned for a modification of the support order, so as to provide her with a larger allowance. The husband denied that the support order was still in force, and set up the Nevada divorce decree as a bar to the wife's action. The Supreme Judicial Court of Massachusetts arrived at the same conclusion as in *Sherrer* v. *Sherrer*, and again this decision was reversed by the Supreme Court of the United States, Frankfurter and Murphy JJ. dissenting.

The only material question in both cases was whether Massachusetts was bound by full faith and credit to accord recognition to the Florida and Nevada decrees. Vinson C.J. delivering the majority judgment in each case referred to the argument that special considerations were involved in matrimonial and family cases. Since the regulation and control of such relationships were vested in the States, it was argued that in such a case as this, the recognition demanded by full faith and credit must be subject to a right in a State called upon to recognise a divorce decree of a sister State to determine whether such a decree was pronounced by a court which had validly assumed jurisdiction. The learned Chief Justice flatly rejected this contention.

> 'This is not a situation in which a State has merely sought to exercise such power over a domiciliary. This is, rather, a case involving inconsistent assertions of power by courts of two States of the Federal Union and thus presents considerations which go beyond the interests of local policy, however vital. In resolving the issues here presented, we do not conceive it to be a part of our function to weigh the relative merits of the policies of Florida and Massachusetts with respect to divorce and related matters. Nor do we understand the decision of this Court to support the proposition that the obligation imposed by Article IV P.1. of the Constitution and the Act of Congress passed thereunder amounts to something less than the duty to accord *full*[28] faith and credit to decrees of divorce entered by courts of sister States. . . . If in its application local policy must at times be required to give way, such "is part of the price of our federal system"'.

The learned Chief Justice then pointed out that this did not mean that 'in no case may an area be recognised in which reasonable accommodations of interest may properly be made'. It was one thing, as in the second *Williams Case*, to re-examine jurisdictional

[28] Vinson C.J.'s italics.

findings where a divorce decree has been pronounced in ex parte proceedings. But it was quite another thing to hold that such a re-examination could be made where both parties had participated in the original proceedings, and where a full opportunity had been given to the parties to contest the issue of domicile. *Davis* v. *Davis*[29] was clear authority for the proposition that here the obligation to accord full faith and credit debarred a sister State from re-opening jurisdictional findings. As for *Andrews* v. *Andrews*,[30] the facts presented variations from the present case. But in so far as that case might be said to be inconsistent with the present decision it must be regarded as superseded. It had been decided prior to the considerable modern development in the finality of jurisdictional findings.

Frankfurter J., with whom Murphy J. concurred, delivered a long and powerful dissenting judgment.

> 'The real question here is whether the Full Faith and Credit Clause can be used as a limitation on the power of a State over its citizens who do not change their domicile, who do not remove to another State, but who leave the State only long enough to escape the rigors of the law, obtain a divorce, and then scurry back'.

The fact was that in the United States the individual States by virtue of the control given to them over marriage and family relations had a vital concern in these matters. The contract of marriage was a peculiar one, and it was not possible to put an end to it by mere agreement between the parties. It was only the State with an interest recognised by law as sufficient which had the power to pronounce a decree, and the obligation to accord recognition under the full faith and credit provisions depended upon the existence of jurisdiction validly assumed by the court pronouncing the decree. As for the second *Williams Case:*

> 'the nub of the *Williams* decision was that the State of domicile has an independent interest in the marital status of its citizens that neither they nor any other State with which they may have a transitory connection may abrogate against its will. Its interest is not less because both parties to the marital relationship instead of one sought to evade its laws. In the *Williams Case*, it was not the interest of Mrs. Williams, or that of Mr. Hendryx, that North Carolina asserted. It was the interest of the people of North Carolina. The same is true here of the interests of Massachusetts. While the State's interest may be expressed in criminal prosecutions, with

[29] 305 U.S. 32.
[30] 188 U.S. 14.

itself normally a party as in the *Williams Case*, the State also expresses its sovereign power when it speaks through its courts in a civil litigation between private parties'.

This is to say, it was open to a court, called upon to recognise a divorce decree of a sister State, to question the finding of jurisdictional fact. It did not mean that this should be done lightly. A heavy burden lay on the party who sought to show that the court which had made the decree had improperly assumed jurisdiction. But it was unsound to hold that it was only in the case of uncontested or ex parte proceedings that there was power to reinvestigate jurisdictional findings. It would put a premium on collusion, perjury, and fraud. It was open to Congress in the exercise of its powers to enact laws for the amplification of the full faith and credit clause of the Constitution to give a wider scope to that doctrine, but until that was done, there was no inflexible obligation on a State court to recognise the decree of a sister State when it could be convincingly demonstrated that the original court had proceeded on a wrong view of its jurisdiction. 'To permit such States to bind all others to their decrees would endow with constitutional sanctity a Gresham's Law of domestic relations.'

Sherrer v. *Sherrer* and *Coe* v. *Coe*, are the latest pronouncements upon this vexed question. Both cases, especially *Coe* v. *Coe*, appear to fall in the special category of support cases distinguished by Douglas, Black and Rutledge JJ. in *Esenwein* v. *Commonwealth*. But in *Coe* v. *Coe* there seems little reason to make any special provision. Unlike the *Esenwein Case*, the wife in *Coe* v. *Coe* was the party who had been granted the Nevada divorce. Again the husband's petition in *Sherrer* v. *Sherrer* for a declaration that he might convey his real estate as though he were sole should involve no special injustice to the wife who instituted the proceedings in Florida. In any case, the result in these two recent cases appears to accord with the views of Douglas and Black JJ. in the *Esenwein Case*, as they confined their judgment in that case to cases of non-appearance and lack of service.

The importance of *Sherrer* v. *Sherrer* and *Coe* v. *Coe* is that it lays down that where both parties enter an appearance, there is no power in a court called upon to recognise a decree to deny recognition on grounds of want of jurisdiction. The doctrine of the second *Williams Case* is expressly confined to uncontested proceedings, and *Andrews* v. *Andrews* is apparently no longer law. We have seen in a passage from the judgment of Frankfurter J. in the *Williams Case* that there was some uncertainty as to whether the decision in that case was confined to uncontested proceedings, but

in view of his clear dissenting judgment in the *Sherrer* and *Coe Cases*, the position of the learned judge is now quite clear.

Is the result a reasonable one? It is submitted that it is hard to resist the logic of the dissent of Frankfurter and Murphy JJ.—that is to say, assuming that there is any power at all to open a jurisdictional finding so as to enable a court of a sister State to refuse recognition. If, as in the *Williams Case*, it was possible for the majority to hold that recognition could be refused without violence to the obligation to accord *full* faith and credit, it seems difficult to argue that the fact that one or both parties appear in the original proceedings should be relevant to the question whether the jurisdictional finding may be questioned. As Frankfurter J. put it, the practical result of the majority decision in the *Sherrer* and *Coe Cases*:

> ' will be to offer new inducements for conduct by parties and counsel, which, in any other type of litigation, would be regarded as perjury, but which is not so regarded where divorce is involved because ladies and gentlemen indulge in it. . . . The essence of the matter is that through the device of a consent decree a policy of vital concern to States should not be allowed to be defied with the sanction of this court. If perchance the court leaves open the right of a State to prove fraud in the ordinary sense—namely, that a mock contest was won by prearrangement—the claim falls that today's decision will substantially restrict the area of uncertainty as to the validity of divorces. If the court seeks to avoid this result by holding that a party to a feigned legal contest cannot question in his home State the good faith behind an adjudication of domicile in another State, such holding is bound to encourage fraud and collusion still further '.

The *Sherrer* and *Coe* decisions, on the one hand, have the merit that they dispose of any uncertainty there may have been on the question whether the fact that proceedings are contested precludes a court from denying recognition to the decree of a sister State. On the other hand, it is submitted that they deepen perplexity because the majority do not, it is submitted, produce any convincing reason why the rule should be different in the case of contested proceedings. As the law stands, therefore, we have a distinction between contested and uncontested proceedings, and in other cases, a distinction suggested by some judges between issues involving criminal proceedings and those involving support for a deserted wife. Perhaps in the light of all this, one may look with a rather deeper sympathy at the view of *full* faith and credit

propounded by the minority in the second *Williams Case* and by Fullagar J. in the Australian case of *Harris* v. *Harris*.

These decisions have more than an academic interest for English private international lawyers. They may be linked to English law through the much discussed case of *Armitage* v. *Att.-Gen.*[31] There, the wife of a man domiciled in New York obtained a decree of divorce in South Dakota, after residing in the latter State for ninety days. The decree was pronounced on grounds of desertion. While desertion was not a ground of divorce in New York, it was proved that New York would recognise this divorce decree. Since the parties were domiciled in New York in the view of the English court and since New York would recognise the South Dakota decree, it was held that the South Dakota decree must be recognised in England. The case has been subjected to much discussion and some criticism,[32] but it is submitted that the decision is justifiable in principle. Having regard to the cases discussed above, it would appear that the doctrine of *Armitage* v. *Att.-Gen.* will produce the following results in England. In all cases we shall assume that in the view of English law, the parties are domiciled in North Carolina.

(i) If a divorce decree is pronounced in ex parte (*quære* undefended) proceedings in Nevada, and a North Carolina court finds that *one* of the parties was domiciled in Nevada when the decree was made, North Carolina must recognise the decree. This is the rule in the first *Williams Case*. In such a case, following *Armitage* v. *Att.-Gen.*, the Nevada decree must be recognised in England. It seems, therefore, that an English court which is called upon to decide whether it must recognise a Nevada decree will have to determine whether North Carolina would hold that either the husband or wife was domiciled in Nevada. This is a strange exercise for an English court in view of *Att.-Gen for Alberta* v. *Cook*.[33]

(ii) If a divorce decree is pronounced in ex parte (*quære* undefended) proceedings in Nevada and a North Carolina court would find that neither party was domiciled in Nevada at the relevant time, then North Carolina would not be bound to recognise the Nevada decree. This is the result of the second *Williams Case*. In such a case an English Court would not be bound to recognise the Nevada decree.

(iii) If a divorce decree is pronounced in *contested* proceedings in Nevada, *Sherrer* v. *Sherrer* and *Coe* v. *Coe* oblige North Carolina

[31] [1906] P. 135.
[32] Morris, 24 Can.Bar.Rev. 73; but see Tuck, 25 Can.Bar.Rev. 226; Falconbridge, *Conflict of Laws*, p. 665.
[33] [1926] A.C. 444.

to recognise the decree, whatever view a North Carolina court would take of the domicile of the parties. In such a case *Armitage* v. *Att.-Gen.* obliges an English court to recognise the Nevada decree.

It remains only to note that the interpretation of full faith and credit adopted in Victoria in *Harris* v. *Harris* avoids all these distinctions. Provided that an English court would find that the parties to a divorce decree were domiciled at the date of the decree in an Australian State, and a decree of divorce is pronounced in another Australian State, since full faith and credit obliges *every other State* to recognise the decree *in any event* (for such seems to be the plain meaning of *Harris* v. *Harris*), the decree will be recognised in England under *Armitage* v. *Att.-Gen.*

(*Concluded*)

EDITORIAL NOTES

THE HAGUE CONFERENCE OF THE INTERNATIONAL BAR ASSOCIATION, 1948

'MAY the Sun of Justice illuminate us' (Sol justitiae illustra nos) is the first motto to greet the visitor on entering the Palace of Peace at The Hague, where the International Bar Association held its second Conference from August 16 to 21, 1948. It could, with some justification, be applied to this Association, one of whose principal aims, as set out in its Constitution, is 'to promote the administration of justice under law among the peoples of the world'. The difficulties in the way of the complete attainment of that objective appear formidable when one considers the divergent views of justice and law prevailing in the fifty-two countries represented at the Conference. There is no reason, however, why an attempt should not be made to harmonise and, if possible, unify the conceptions of these two fundamental bases of peace and order, and Conferences like the one held at The Hague are bound to facilitate that task and provide a general stimulus to the future formulation of a uniform system of law and justice. Indeed, the earnest co-operation of the lawyers in all countries is now more necessary than ever, since the need for a world governed by law and justice, and not by force, has become increasingly urgent.

One of the most important subjects discussed at the Conference, which was held under the Chairmanship of Dr. J. Drost, President of the Netherlands Bar Association, related to the progressive development of international law, on which no fewer than thirty-three papers had been presented by the various national organisations. It will be recalled that Article 1 of the Charter of the United Nations provides that the adjustment or settlement of international disputes or situations which might lead to a breach of the peace must be brought about 'in conformity with the principles of justice and international law'. The fact that international law is thus fixed as one of the standards for the solution of international controversies makes it necessary that its rules should be rendered more readily ascertainable. This necessity is reflected in Article 13 of the Charter, which entrusts the General Assembly with the duty of initiating studies and making recommendations for the purpose of encouraging the progressive development of international law and its codification. As was

pointed out by several speakers at the Conference, the term 'progressive development of international law' must be contrasted with its 'codification'. The discussions which took place during the meetings of the Legal Committees of the United Nations last year, showed a similar tendency to distinguish these two terms. Whilst codification is intended to state rules as they already are, the progressive development of international law requires the drafting of new rules on subjects with regard to which no general agreement has been reached up to the present. There exists, unfortunately, no legislative authority in the international society capable of amending or altering the principles of international law to correspond with the ever-changing conditions of modern international life. There is thus a vital difference between a municipal statute and an international treaty as a source of law, since a treaty binds only those States which accept it, whereas a statute binds all those who are subject to the jurisdiction of the legislature responsible for it. Codification, on the other hand, presents a much easier problem as it only involves the systematic arrangement and formulation of the rules of international law, based on the practice of States and the decisions of international tribunals.

In a paper read to the Grotius Society in October, 1946,[1] Sir Cecil Hurst, mindful of the disappointing results of the first Codification Conference at The Hague in 1930, expressed his considered opinion that the ascertainment in broad outline of the rules of international law could not be done by government action. It was inevitable that representatives of governments attending a diplomatic Conference and furnished with official instructions, would tend to emphasise the national standpoints of their countries, however objectively minded they might be. Moreover, the task of codification had become so vast, that it could not be accomplished on a purely individual basis, but required a combination of national and international effort. Sir Cecil Hurst's paper was carefully considered by a British committee set up, under the chairmanship of Sir Arnold D. McNair, by the International Law Association and its Report, which was in general agreement with Sir Cecil's conclusions, was adopted by the Prague Conference of that Association in September, 1947.[2] The McNair Committee had been greatly impressed by the American Restatements of Private Law and by the International Law Research done under the auspices of the Harvard Law School, and recommended a similar technique in the

[1] *Transactions of the Grotius Society*, Vol. 32 (1947), pp. 135–153.
[2] I.L.Q., Vol. 1, p. 532.

co-ordination of the process of the restatement of the existing rules of international law.

The Conference further discussed in detail the steps taken so far by the United Nations in pursuance of the duty assigned to the General Assembly by Article 13 of the Charter. It welcomed its action in setting up an International Law Commission entrusted with the task of surveying the whole field of international law with a view to selecting topics for codification and making recommendations to the General Assembly. First projects for this codification have already been referred to this Commission by the General Assembly. These are the draft Declaration on the Rights and Duties of States and the formulation of the principles recognised in the Charter and in the judgment of the International Military Tribunal at Nuremberg. The Commission is also directed to prepare a draft Code of ' offences against the peace and security of mankind ', indicating clearly the place to be accorded to these principles. In formulating these rules, the Commission is authorised to consult with other organs of the United Nations, with scientific institutions, both national and international, official and non-official and, if necessary, with individual experts. It was in full accordance with this idea that the International Bar Association adopted a resolution at its closing session, proposed by its General Secretary Mr. Amos J. Peaslee, offering its collaboration and assistance to the International Law Commission in the great object in which it will be shortly engaged.

The disadvantages resulting from dual nationality and statelessness gave rise to an animated discussion in Symposium II of the Conference. The majority of the speakers were of the opinion that a State ought to prescribe on a reasonable basis the modes of acquisition of nationality. This was particularly important in relation to international marriages, which very often entailed considerable hardships on women. The Conference considered that the work now being done under the auspices of the United Nations should be pressed to an early conclusion.

The Symposium had before it an interesting paper by Sir Benegal Narsinga Rau (India) on the recent United Kingdom statute, under which a person belonging to one of the component parts of the British Commonwealth will not only be a citizen of that part, but also ' a citizen of the Commonwealth '. He suggested that the privileges resulting from such a status could be usefully extended to new units, for instance, to the countries composing the Western Union.

The discussion on immigration covered the question of transit visas, the travel of delegates to non-governmental conferences and

of lawyers seeking to act on behalf of clients abroad, who should not be arbitrarily prevented from visiting other countries where the exercise of their profession made their presence necessary.

In the section on International Penal Law, a resolution was adopted under which the application of penal sanctions for violations of international law required the drafting of a new criminal code and a competent international jurisdiction and police force. The procedure and the right of defence and of audience before this international jurisdiction ought to follow the system laid down for the International Military Tribunal at Nuremberg. It was also desirable that the conditions of extradition for infringements of international law should be made uniform in the various countries.

The rules of 'equal rights' for men and women advocated in the Charter of the United Nations came up for discussion in the section on Comparative Law and it was urged that no restrictions ought to exist on the right of women to franchise and eligibility to all public offices.

In Symposium IV—Admiralty and Prize Law, which was presided over by Dr. Colombos, three important resolutions were adopted. Resolution No. 1 expressed the willingness of the International Bar Association to collaborate in such preparatory work as in the considered opinion of the appropriate international bodies was deemed advisable for the purpose of the further unification of maritime law; Resolution No. 2 invited the Comité Maritime International to consider and examine the advisability of setting up an International Maritime Court with optional jurisdiction in maritime and aeronautical cases and open to individual nationals of the Contracting States. Resolution No. 3 asked the Executive Council and the House of Deputies of the International Bar Association to take appropriate steps to promote the setting up of a Committee to study : (a) The adaptation of prize law to modern conditions of naval and aerial warfare by establishing a balance between the interests of belligerents and those of neutrals; (b) the unification of prize law with general application and, if this is not possible, with particular application to allies engaged in the same war.

The feasibility of drafting a new International Code of Ethics for Lawyers was discussed at the Second Plenary Session of the Conference. A Code on this subject had already been proposed at the meeting of the Inter-American Bar Association held at Lima, Peru, in 1947, and will come up for further consideration at its next meeting at Detroit, Michigan, in May, 1949. In commenting on this Code, Mr. Richard O'Sullivan, K.C., said that in its present form it could not suit the very different juridical institutes of the

legal profession in Great Britain, which had been described as the 'purest incarnation of private enterprise'. Like the English Constitution, the essence of common law was unwritten. So, too, the English Bar had no written Code of ethics. Its discipline and professional conduct were enforced by the Bar Council and the Benchers of the Inns of Court. Similarly, the discipline of the solicitors' branch of the profession was administered under statutory powers by the Law Society, which had always maintained its high traditions. He, therefore, suggested that the International Bar Association should define certain general principles, which should inspire the legal profession everywhere and then leave it to the national organisations in the several countries to incorporate these ideals and principles in their respective rules. The Conference expressed itself generally in this sense and recommended that the whole question should be referred to the Executive Council of the Association with a view to the drafting of such a Code for consideration at its third Conference, which has provisionally been fixed to take place in the summer of 1950.

Unlike the International Law Association, which celebrated its seventy-fifth anniversary at Brussels in September, 1948, the International Bar Association is a new body, having been inaugurated in the City of New York as recently as February, 1947. It is therefore no reflection on its work to say that it has not yet found its feet. This is shown by its over-charged programme at The Hague Conference, which included the consideration of over 160 papers in two plenary meetings and seventeen symposia. Such a wide field of subjects, ranging from the problem of the 'Restoration of Property Rights after World War II' to 'Comparative Law', inevitably lead to lengthy discussions, very often unrelated to the particular topic on the agenda. There is no reason, however, why it should not eventually prove a success. In addition to the scientific work which it is well fitted to accomplish, it has the great advantage of bringing together lawyers representing all the principal legal systems, the great majority of whom are not qualified experts on any special branch of the law, but 'general practitioners', and thus better able to envisage the law as a whole and to promote its unification. And if it is true, as Mr. R. Menzies, the former Prime Minister of Australia, said at the dinner which preceded the closing of the Conference, that there can be 'no real world order unless based on justice', the duty of establishing that justice through the rule of law rests mainly on the legal profession. It was a great responsibility. But so was the need for an effective organisation on which the structure of international understanding and peace could be built.

THE CONTINENTAL SHELF [1]

No exhaustive study has as yet been devoted to the complicated and far-reaching international issues raised in the Proclamation of the President of the United States of September 28, 1945, as to the natural resources of the Continental Shelf [2] though both the Institute of International Law and the International Law Association are now taking steps to set up committees to study the subject. The Proclamation does not define the Continental Shelf, though clearly from its terms a large area was meant. In general, the meaning attached to this term, for example by the oil world, is the subsoil of the sea up to a water depth of 600 feet, which means a limit of 100 fathoms. Nor is the Proclamation limited to petroleum, but extends to all the resources to be obtained from the Continental Shelf.

The world need for petroleum which dictated the policy of the United States is incontestable. If, as seems to be the case, it is a feasible proposition to obtain petroleum from the Continental Shelf, the necessary operations to obtain it will be undertaken, and that is a situation which international lawyers must face.

Although there is no specific claim to sovereignty over the Continental Shelf or to the waters of the high seas above it in the Proclamation and the Executive Order issued with it, the only possible deduction from the text of these two documents is an intention on the part of the United States Government to claim as from the issue of the Proclamation and without waiting for the commencement of any development work, an exclusive right to control the Continental Shelf adjacent to the coasts of the U.S.A.; and thereby to control all operations for winning its resources, whether within or outside of the three mile limit. It is difficult to see in what respect the rights which are claimed are less than sovereignty, which does not denote more than the right and determination of a State to be master in its own household : if the rights claimed over the Continental Shelf are less than sovereignty, then it is difficult to see the justification for the exclusive nature of the control claimed.

Three and a half years before the President's Proclamation a treaty was concluded between Great Britain and Venezuela with regard to the submarine area of the Gulf of Paria which is curiously

[1] Summary of a paper read to The Grotius Society by Sir Cecil Hurst, G.C.M.G., on December 1, 1948. The full text will be published in Vol. 34 of the Society's *Transactions*.

[2] For the text of this Proclamation, see *American Journal of International Law*, Vol. 40 (1946), *Official Documents Supplement*, pp. 45 and 47.

similar in certain features to the Proclamation.[3] It is limited to the submarine areas of the Gulf, *i.e.*, the sea bed and subsoil outside of the territorial waters of the parties. It contains a saving clause for the status of the islands, islets and rocks and the territorial waters around them. It preserves the status of the waters of the Gulf, making no attempt to appropriate them, and it forbids all interference with the rights of navigation. In theory, the Continental Shelf policy may have been intended to introduce the same system, *i.e.*, a system whereby a State's sovereignty is defined by a line which goes upwards *ad infinitum* through the air space from the bed of the sea at the limit of territorial waters; then laterally along the sea bed until the limits of the Continental Shelf are marked; and then downwards at an angle *ad infinitum* at the point when the sea bed begins to fall steeply. It is more doubtful if it would work satisfactorily in practice. There is little maritime traffic in the Gulf of Paria, and consequently the stagings or derricks supporting the pipes to the oil wells in the sea bed need not materially inconvenience shipping.

It is still a valid rule in law that sovereignty can be acquired by occupation over limited areas of the sea bed for the protection of pearl and oyster and other sedentary fisheries, where such occupation interferes neither with fishing for swimming fish in the open sea nor with navigation. But it is difficult to apply this principle to the Continental Shelf for three reasons. The first is the magnitude of the areas of the Continental Shelf compared with the small extent of the banks or beds where sedentary fisheries exist; the second is the variety of resources capable of being obtained from these submarine areas; and the third is the impossibility of obtaining some of them without the erection of installations which would be a serious hindrance to navigation. The area of the Continental Shelf of the United States has been estimated at 750,000 square miles, and its width at 250 miles. Practically the whole of the North Sea lies above the Continental Shelf of the countries bordering upon it, as does the whole of the English Channel. To extend rights of sovereignty over it would mean, for example, that a submarine cable could not be laid from Rotterdam to New York without violating the sovereignty of Britain; while clearly the erections of stagings or derricks for the extraction of resources from the sea bottom of the English Channel would be bound to constitute a serious obstacle to shipping.

In practice, if the policy with regard to the resources of the

[3] Order in Council of August 6, 1942 (Cmd. 16224), 'The Submarine Areas of the Gulf of Paria (Annexation) Order'.

Continental Shelf were limited to petroleum, no great inconvenience might be caused to navigation in view of the areas most affected, such as the Gulf of Paria or the Gulf of Mexico, where shipping is not very extensive. But the claim to control over resources is not limited to petroleum, which extends the problem to other areas where valuable minerals may be found.

The legal problems raised by the Continental Shelf policy are disquieting. But the world needs oil, and the study of the problems should be approached not with the idea of magnifying the objections, but with the intention of finding ways of overcoming the difficulties with which the whole subject is surrounded.

THE INTERNATIONAL COURT OF JUSTICE

ELECTION OF JUDGES

The five retiring judges of the International Court of Justice were all re-elected by the General Assembly and the Security Council on October 22, 1948, at simultaneous but independent elections in accordance with the Statute of the Court. All five were chosen for the full term of nine years.

The judges are: Abdel Hamid Badawi Pasha (Egypt); Hsu Mo (China); John Erskine Read (Canada); Bogdan Winiarski (Poland); and Milovan Zoričič (Yugoslavia). Their new term of office commenced on February 6, 1949.

Their original election to the Court was in February, 1946, for three years. Five of the other judges were elected for six years and five for nine years.

Those elected for a six-year period are: Isidro Fabela Alfaró (Mexico); Green Haywood Hackworth (United States); Helge Klaestad (Norway); Sergi Borisovitch Krylov (U.S.S.R.); and Charles de Visscher (Belgium). Those elected in 1946 for the full nine-year period are: Alejandro Alvarez (Chile); Jose Philadelpho de Barros e Azevedo (Brazil); Professor Jules Basdevant (France), who is Vice-President of the Court; Jose Gustavo Guerrero (El Salvador), who is the Court's President; and Sir Arnold Duncan McNair (United Kingdom).

THE INTERNATIONAL LAW COMMISSION

It will be recalled that the decision to establish an International Law Commission entrusted with the 'progressive development and codification of international law' (Article 13 (1) (a) of the Charter

of the United Nations) was taken by the General Assembly in November, 1947, but that the election of its members was postponed till the September session at the Palais de Chaillot, Paris. This was completed on November, 3, 1948, when the General Assembly elected the fifteen members of the Commission.

Seventy-four candidates from forty-six countries had been nominated and some names had been put up by more than one State. Twelve members were elected on the first ballot and three on the next. The elected members, all of whom are well known in the field of international law are: Professor Ricardo J. Alfaro (Panama); Ambassador Gilberto Amado (Brazil); Professor James Leslie Brierly (United Kingdom); Professor Roberto Cordoba (Mexico); Professor J. P. A. François (Netherlands); Professor Shuhsi Hsu (China); Professor Manley O. Hudson (United States); Faris Bey el Khouri (Syria); Professor Vladimir M. Koretsky (U.S.S.R.); Sir Benegal Narsinga Rau (India); Justice A. E. F. Sändstrom (Sweden); Professor Georges Scelle (France); Professor Jean Spiropoulos (Greece); Professor Jesus Maria Yepes (Colombia); and Dr. Jaroslav Zourek (Czechoslovakia).

In accordance with the Statute of the Commission which was adopted by the General Assembly last November, the fifteen members of the Commission are to serve for three-year terms and will be eligible for re-election.

THE BRUSSELS CONFERENCE OF THE INSTITUTE OF INTERNATIONAL LAW

A SESSION of the Institute of International Law was held at Brussels from July 27 to August 3, 1948. The attendance was small, disappointingly so; but currency restrictions and difficulties as to travelling prevented several members and associates who had hoped to attend from being present.

The President of the Session was M. Charles de Visscher, a judge of the International Court of Justice, and at the beginning of the Session two Vice-Presidents were elected (M. Scelle (France) and M. Wehberg (Germany)) to take the place of the Vice-Presidents who retired.

Progress was made with filling up the numbers of the Institute which had become sadly depleted during the war years. Thirteen of the Associates were promoted to the rank of Member, one of whom was Professor Gutteridge of Cambridge. Eighteen new Associates were elected, among them being Mr. Fitzmaurice, second Legal Adviser of the Foreign Office. For the first time in

its history the Institute elected a woman as an Associate, Madame Bastid, a daughter of M. Basdevant, the Vice-President of the International Court of Justice at The Hague, one of the French candidates being thus honoured. Professor Geo. Grafton Wilson, the doyen of the American members, was elected an Honorary Member.

The only text adopted by the Institute was a series of Resolutions on conflicts of jurisdiction in divorce and matrimonial separation. The Resolutions came up for discussion on the basis of a report framed by Professor Gutteridge and were the subject of prolonged discussion and considerable amendment. The French text of the Resolutions as ultimately adopted is given as an annex to this note. The Resolutions failed to achieve unanimous support and several members preferred to abstain when it came to the vote.

Another subject discussed was the right of asylum. In the end the draft Resolutions on this subject were withdrawn for further study of the whole subject by the Rapporteur, M. Perassi of Italy, and the members of his Commission. It is hoped that a revised text will be submitted at the next session of the Institute.

Considerable attention was also devoted to the subject of the Revision of General Conventions, and the provisions which should be inserted in the text of a Convention to render this possible and also to the establishment of an international criminal jurisdiction. Reports were submitted on both subjects, debated at length, but no Resolutions were adopted.

At the close of the Session Sir Arnold McNair was elected President of the Institute until the close of the next session. The English members invited the Institute to hold its next session in England. The invitation was cordially accepted. The session will be held in 1950, and, if it can be arranged, at Bath. M. Henri Rolin, the President of the Belgian Senate, was elected First Vice-President. The Institute also decided to appoint an Assistant Secretary-General and elected M. Georges Kaeckenbeeck of the Belgian Foreign Office to the post.

There was a general sentiment at Brussels that a drastic overhaul is required of all the Commissions of the Institute which are nominally in being. It is hoped that this work will be taken in hand without delay so that it may bear fruit before the 1950 session.

C. J. B. H.

Résolutions sur les Conflits de Compétence Juridictionnelle en matière de divorce et de séparation de corps, adoptées par l'Institut de Droit International le 29 juillet 1948

Préambule

L'Institut de Droit International,

— considérant que les conflits de lois et de juridictions en matière de divorce et de séparation de corps se sont, en raison des modifications démographiques, multipliés depuis less convestions de Droit international privé conclues à La Haye en 1902;

— considérant qu'il y a lieu de s'inspirer autant que possible des divers systèmes positifs de Droit international privé, afin de faciliter entre eux un rapprochement favorable à la reconnaissance internationale des solutions adoptées;

— considérant que la multiplication des personnes dont la nationalité ou le domicile est incertain, la rupture de l'unité de nationalité des époux, les mariages de guerre, les déchéances de nationalité pour des motifs politiques et autres causes analogues, exigent l'adoption de règles spéciales afin de permettre à de nombreuses personnes de régulariser la situation exceptionnelle dans laquelle elles se trouvent;

Propose:

1°) La demande en divorce peut être formée:
   a) devant la juridiction nationale de l'un ou l'autre des époux;
   b) devant la juridiction du pays de la résidence habituelle de l'un ou l'autre des époux. Au sens de la présente disposition, cette résidence ne sera considérée comme habituelle que si elle a duré au moins 3 ans avant la formation de la demande.

2°) L'admissibilité du divorce est régie par la loi du lieu où la demande est formée à moins que la loi nationale des époux ne s'oppose à l'institution du divorce. Si les époux n'ont pas la même nationalité:
   a) le divorce peut être prononcé lorsque l'une des parties est ressortissante du pays du tribunal saisi, si la loi du pays de ce tribunal le permet;
   b) le divorce ne peut pas être prononcé lorsqu'aucun des époux n'est ressortissant du pays du tribunal saisi, si la loi de la partie demanderesse s'y oppose.

3°) La détermination des causes du divorce relève de la loi du For.

4°) Le divorce prononcé conformément aux dispositions précédentes sera reconnu partout, à moins que le défendeur à l'action en divorce n'établisse qu'il n'a pas eu connaissance, en temps utile, de l'action intentée contre lui.

5°) Les présentes dispositions ne s'appliquent qu'au divorce prononcé par autorité de justice. Elles s'appliquent dans les mêmes conditions à la séparation de corps ou à toute autre institution équivalente.

6°) Les personnes qui ont été forcées d'abandonner leur pays d'origine ou celui de leur ancien établissement peuvent intenter une action en divorce ou en séparation de corps devant le juge de leur résidence effective actuelle et selon la loi du For; sont réservées les règles générales relatives à la reconnaissance des jugements à l'étranger.

THE SECURITY COUNCIL AND THE BERLIN QUESTION

1. On September 29, 1948, the Governments of France, the United Kingdom, and the United States of America presented identical Notes to the Secretary-General of the United Nations, bringing to the attention of the Security Council the threat to peace which, they asserted, had been created by the measures of blockade imposed by the Soviet Union on the western sectors of Berlin. These identical Notes were placed on the provisional agenda of the Security Council for its 361st meeting at the Palais de Chaillot, Paris, on October 4, 1948. At this and subsequent meetings the competence of the Security Council to discuss the Berlin question was put in issue and energetically debated.

2. The debate turned around two questions of legal interest: the first, a question of secondary importance yet throwing some light on Security Council procedure, was: Does the adoption of the agenda by the Security Council prejudice any question of its competence to discuss an item on that agenda? The second, which was the question of substance, was: Did Article 107 of the United Nations Charter preclude the Security Council from discussing the Berlin question?

I

3. Rules 6–9 of the Provisional Rules of Procedure of the Security Council, which are relevant to the first question, read as follows:—

Rule 6

'The Secretary-General shall immediately bring to the attention of all representatives on the Security Council all communications from States, organs of the United Nations, or the Secretary-General, concerning any matter for the consideration of the Security Council in accordance with the provisions of the Charter.'

Rule 7

'The Provisional Agenda for each meeting of the Security Council shall be drawn up by the Secretary-General and approved by the President of the Security Council. Only items which have been brought to the attention of the representatives on the Security Council in accordance with Rule 6, items covered by Rule 10, or matters which the Security Council has previously decided to defer, may be included in the Provisional Agenda.'

Rule 8

'The Provisional Agenda for a meeting shall be communicated by the Secretary-General to the representatives on the Security Council at least three days before the meeting, but in urgent circumstances it may be communicated simultaneously with the notice of the meeting.'

Rule 9

'The first item on the Provisional Agenda for each meeting of the Security Council shall be the adoption of the Agenda.'

4. There are two elements in these rules which call for comment. The first is the distinction between the Provisional Agenda and the Agenda of the Council: the Provisional Agenda is compiled of matters referred to the Security Council under Article 34 or 35 of Chapter VI (Pacific settlement of disputes); Article 39 of Chapter VII (Action with respect to threats to the peace, breaches of the peace, and acts of aggression); or Article 99 of Chapter XV (The Secretariat). The Council is bound by Article 24 to take notice of such matters and to decide whether and when it will discuss them, and what recommendations it will make or other action it will take upon them. When an item of the Provisional Agenda has been adopted by the Council it becomes an item on the Agenda, of which the Council is formally seized, and acquires a certain status which need not be discussed now. The second element is the provision of Rule 9 that the first item on the Provisional Agenda for each meeting is the adoption of the Agenda. Now there may be a number of reasons why the Council may defer or refuse the adoption of an item on the Provisional Agenda. The communication to the Secretary-General may have come from a private individual or a non-governmental authority: in this case the Secretary-General and the President, acting under Rule 6, would presumably not put it down in the Provisional Agenda; but if they did, the Council would and indeed could not adopt it on to its Agenda. Again the communication may be frivolous, or fail to establish on the face of it any case under Chapters VI or VII of the UN Charter,

or be couched in unsuitable terms; finally, the communication may raise an issue outside the competence of the Council. In these two cases, the Council itself must decide whether it will adopt such an item on to its Agenda.

It is arguable, therefore, that any question of the competence of the Security Council to discuss a communication brought to its notice under Rule 7 must be answered *before* the adoption of the agenda under Rule 9, and that it is indeed for this purpose that a careful distinction between the Provisional Agenda and the Agenda has been made. Let us now turn to the Council's debate on the point.

5. As soon as the President, Dr. Bramuglia (Argentine) had declared that the adoption of the agenda was open for discussion, Mr. Vyshinsky (U.S.S.R.) asked for the floor, and in a long and sometimes fiery speech [1] in which he raised several questions of substance, which will be considered below, argued that the Council was not competent to discuss the Berlin question. M. Van Langenhove (Belgium) then intervened on a point of order; he considered that Mr. Vyshinsky's remarks touching the substance of the question were out of order since the agenda had not been adopted. 'When a Member State', he continued, 'exercises the right of calling upon the Security Council, the Council is automatically seized of the matter. Consequently, the inclusion by the Council of the communication thus made on its agenda is merely a formality. The Council notes that the request in fact emanates from a Member State and that consequently it has been seized of the matter in a regular fashion. As such the inclusion of the item on the agenda has no other significance. It does not imply any admission of competence on the part of the Council. The discussion on competence should follow the formal inclusion of the item on the agenda, not precede it.'

Mr. Vyshinsky immediately replied: 'To approve an agenda means to recognise that it is appropriate, and that the questions to be included in its agenda are suitable and correspond to the competence of the body in question'. Therefore the question whether the Council is competent to discuss a matter inscribed on its provisional agenda must, if it is raised, be settled before the agenda can be formally adopted.[2]

M. Parodi (France) did not commit himself to the view that

[1] Security Council, Official Records (Third Year), No. 113, p. 16.

[2] *Ibid.*, p. 17. As Dr. Jessup (U.S.A.) pointed out, the representative of the U.S.S.R. took a different point of view in the *Iranian Case* in January, 1946, when he said: 'If this item (the *Iranian Case*) is placed on the agenda so that we may discuss whether the question should be considered, then I have no objection to its inclusion on the agenda for the next meeting'.

any question, whose inclusion on the agenda has been requested, must be so included, but he subscribed to M. van Langenhove's opinion that it is not a good procedure to discuss a question which has not been included in the agenda. 'Even if a question of competence were raised', he said, 'we (*sc.*, the French delegation) always thought and maintained that it was appropriate to have the question included in the agenda before discussing it.' He cited the Hyderabad question, which was placed on the agenda, the issue of the competence of the Council to discuss it being reserved.

Faris Bey el Khouri (Syria) and Dr. Bramuglia (Argentine) took a similar view.[3]

Sir Alexander Cadogan (United Kingdom) did not pronounce upon the Belgian point of order but took up a middle position between that of M. van Langenhove and his supporters, and that of Mr. Vyshinsky. He observed[4]: 'Actually it does not seem to me to make very much difference. If we were to put the matter on the agenda and then discuss competence and find that we were incompetent, I suppose that we should then have to take the matter off the agenda again. Equally, if we found that we were competent before the question was placed on the agenda, then logically, unless any other objection were raised, we should have to put it on our agenda'.

6. The view expressed by M. van Langenhove and shared by other representatives is open to two objections. First, it is fallacious to argue that the Council cannot discuss a matter which is not on its agenda in the sense of Rule 9; the whole purpose of having a provisional agenda is precisely this, that it does give the Council something, which it is in order to discuss, before the adoption of the agenda. Mr. Vyshinsky may or may not have been out of order in discussing matters of substance, but he was not out of order in raising the issue of competence[5] when speaking to the adoption of agenda, which was the very item for discussion before the Council. Secondly, M. van Langenhove's approach was somewhat formalistic and, to the extent that it was so, it is hardly in accord with a formal interpretation of the rules of procedure; for example, it does not appear to be correct to say that the Council is 'automatically seized of a matter' referred to it through the Secretary-General. It is undoubtedly seized of the communication

[3] Security Council, Proces Verbal/362, pp. 2–5, 8–11, 57–60 and S/PV/366, p. 56.
[4] Official Records, No. 113, p. 28.
[5] In the absence of a ruling by the President, which Dr. Bramuglia deliberately withheld.

but whether it is seized of the substance is a question only the Council can decide.

7. Mr. Vyshinsky's view therefore seems to accord better with a strict interpretation of the rules of procedure, but it is submitted that he went too far in the other direction. The question at issue is whether the Council *must* consider all or any of the preliminary questions, including that of competence, that may be raised before the adoption of the agenda or whether it is free to consider them after adoption. Now there is nothing in the rules of procedure which *requires* the Council to take one course rather than the other; the Council is master of its own procedure and its general practice suggests that a formalistic interpretation of those Provisional Rules of Procedure, which it has adopted, would lead us astray. It is submitted that Sir Alexander Cadogan stated the sound rule of practice, when he implied that the question whether competence is discussed before or after the adoption of the agenda is to be answered not as one of necessary legal procedure but in political terms according to the character of the substantial question involved.

II

8. We may now turn to the question of substance, whether Article 107 of the UN Charter precluded the Security Council from discussing the Berlin question.

Mr. Vyshinsky, in dealing with the applicability of Article 107, advanced four related propositions:—

(i) the Berlin question is part of and concerns the situation in Germany as a whole [6];

(ii) the various international agreements relating to Germany, and in particular those concluded at Yalta and Potsdam, bound the Four Powers to refer matters concerning Germany to the Council of Foreign Ministers; the submission to the Security Council of the Berlin question was consequently a breach by the three governments of these agreements [7];

(iii) even if the Berlin situation was a threat to peace, which he did not admit, the Council of Foreign Ministers was equally competent with the Security Council to undertake the maintenance of peace and security [8]; and finally

(iv) Article 107 [9] drew the boundary between the respective

[6] Official Records, No. 113, p. 11.
[7] *Ibid.*, pp. 11 and 12; S/PV/362, pp. 23–25.
[8] Official Records, No. 113, p. 14; S/PV/362, pp. 26, 27.
[9] ' Nothing in the present Charter shall invalidate or preclude action, in relation to any State which during the Second World War has been an enemy of any

jurisdictions of the Security Council and the Council of Foreign Ministers, and precluded the former from admitting the question to its agenda.

The representatives of the three complainant governments dealt with these propositions at length and effectively showed that Article 107 gave no support to Mr. Vyshinsky's views.

9. In the first place, the three governments were not attempting to isolate the administration of Berlin from the problem of Germany as a whole; on the contrary, they had at all times declared their readiness to negotiate with the Soviet Union not only about the administration of Berlin, and in particular its currency arrangements, but also about the future of Germany as a whole. But they refused to enter into such negotiations under the duress of the Berlin blockade, and the simple and limited issue which they had brought before the Security Council was the threat to peace which they considered this blockade had evoked. The three governments had fulfilled their obligations under Article 33 (1)[10] of the UN Charter and were bound to proceed to the Security Council by Article 37 (1)[11] when their efforts to find a peaceful solution had failed. By reason of Article 103[12] of the UN Charter, the obligations imposed in Chapter VI upon the Four Powers concerned in the occupation of Germany, override any similar obligations assumed under the Yalta and Potsdam agreements. Even if Mr. Vyshinsky's assertion that the Council of Foreign Ministers is an 'instrument for ensuring peace and security', which the Potsdam signatories are bound to use, were correct,[13] the obligation to refer a threat to peace to the Security Council, rather than to the Council of Foreign Ministers, must prevail.

The three governments therefore, in referring the Berlin blockade to the Security Council took their stand upon the provisions of the

signatory to the present Charter, taken or authorised as a result of that war by the Governments having responsibility for such action.'

10 'The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.'

11 'Should the parties to a dispute of the nature referred to in Article 33 fail to settle it by the means indicated in that Article, they shall refer it to the Security Council.'

12 'In the event of a conflict between the obligations of the Members of the U.N. under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.'

13 The Potsdam Protocol does not appear to confer such specific functions on the Council of Foreign Ministers. Apart from the drawing up of Peace Treaties with Italy and the enemy satellites, 'the Council shall be utilised for the preparation of a peace settlement for Germany . . . (iii) other matters may from time to time be referred to the Council by agreement between the Member Governments'. No general competence conferred upon the Council of Foreign Ministers to maintain *international* peace and security in Germany.

UN Charter as far as the threat to peace was concerned; Mr. Vyshinsky's efforts in his first two propositions to broaden the scope of the reference to include Germany as a whole and then to set up the rival jurisdiction of the Council of Foreign Ministers do not appear well founded.

10. The second and central question is whether Article 107 removes the Charter provisions upon which the three governments had taken their stand. A careful scrutiny of the text of Article 107 and the reports of the San Francisco Conference shows that it does not.

(i) '*Nothing in the present Charter shall invalidate or preclude action . . .*'. This language is different from that used in Article 2 (7), where the purpose is to limit the competence of the United Nations and to prohibit its intervention in the domestic affairs of States. Article 107 however 'does not exclude from the jurisdiction of the UN all matters relating to ex-enemy States regardless of the circumstances of the powers affected'.[14] It applies only to action taken or authorised by governments in relation to enemy or ex-enemy States, and frees such action from any charge, whether brought by a Member of UN or by an enemy or ex-enemy State, that it is a breach of the provisions of the Charter, by which all the governments responsible for the control of Germany are bound. Nothing in the Charter precludes such action or renders it invalid after it has been taken, but the Article does not on the face of it limit or even touch the competence, as defined in the Charter, of the organs of the UN to take action within the scope of their responsibilities.

(ii) '. . . *in relation to any State . . .*' (vis à vis d'un Etat). The three governments maintained that the Berlin blockade is a political act aimed against them and not against the German people or Germany as such. Article 107, said Dr. Jessup,[15] 'does not refer to action by a victorious power in the territory of former enemy States against or in relation to another Member of UN'. Sir Alexander Cadogan put it another way[16]: 'It is their status (*sc.*, the three governments), their rights, not Germany's, that are directly affected or prejudiced by the action of the U.S.S.R.'.

Mr. Vyshinsky's answer to this argument would have had greater force had it been entirely consistent with the facts. He maintained that the restrictive measures taken by the U.S.S.R. were a necessary defence against the monetary reform carried through in the Western zones of Germany and the introduction of the Deutsche-

[14] Dr. Jessup (U.S.A.), Official Records, No. 113, p. 25. Compare similar language by Sir Alexander Cadogan at p. 30.
[15] Official Records, No. 113, p. 25.
[16] *Ibid.*, p. 29.

mark into the Western sectors of Berlin. 'When we are speaking of a separately conducted currency reform on German territory', he continued, 'you say this is not in relation to Germany. Where is it? Perhaps it is somewhere in the stratosphere. Is it somewhere up in an ivory tower with no relation at all to Germany? . . . We are dealing with a number of separate measures which violate the interests of the national economy of the Soviet occupation zone of Germany and which . . . undermine the people's economy of Germany'.[17] In other words, because the currency reform was undertaken 'in relation to Germany', the countermeasures, constituting the Berlin blockade, were also to be deemed to have been taken 'in relation to Germany'. But in fact the restrictive measures commenced several weeks before the introduction of currency reform and the Deutschemark to Berlin.

(iii) '. . . *taken or authorised* . . .'. This language covers action by the responsible governments themselves or by one of them authorised by the others or by persons in enemy territory or elsewhere acting under their authority.

(iv) '. . . *as a result of the war* . . .'. This points primarily to the actual imposition and execution of armistice terms and peace treaties, but is not limited to that, the intention of the Article being also to prevent enemy and ex-enemy States from bringing complaints to the UN against Members in respect of their actions as belligerents or treaty beneficiaries or occupying powers.[18] 'But for a provision of this kind', said Sir Alexander Cadogan, 'much of the action which the Allies might legitimately wish to take and might have to take in relation to the enemy States might have been technically inconsistent with the purposes and principles of the Charter—for instance, the principle of not using force. Further, the hands of the Allies might have been tied completely as regards their post-hostility dealings with the enemy States and as regards the eventual peace treaties or arrangements'.[19]

(v) '. . . *by the Governments having responsibility for such action* . . .' (par les Gouvernements qui ont la responsabilité de cette action). There are two points to be considered in this phrase, the first of which appears to be decisive against the U.S.S.R. case as stated by Mr. Vyshinsky.

First, the expression 'having responsibility for such action' cannot be a mere tautology for 'taking or authorising such actions',

[17] S/PV/362, pp. 32–33, 36.

[18] Committee 3 of Commission III of the San Francisco Conference unanimously declared in its report: 'It is understood that the enemy States in this war shall not have the right of recourse to the Security Council or the General Assembly before the Security Council grants them this right'.

[19] Official Records, No. 113, p. 29.

for if that meaning were assigned to it the sentence would become circular. It must, therefore, refer to the rights and powers to take action in relation to an enemy or ex-enemy State, which are vested in certain Members of the UN as military occupants or under international agreement. It follows that only those actions come within the scope of Article 107 which have been taken by governments having such a right or power to take those particular actions.

Secondly, the reference to governments in the plural may be significant. It is arguable from the general sense and purport of the Article that it is a collective and not a distributive plural, and that no unilateral action—that is no action other than that covered by the expression 'taken or authorised'[20]—is protected by Article 107.[21]

11. The language of Article 107 and its general purpose therefore show almost beyond doubt that the blockade of the Western sectors of Berlin is not 'action' contemplated by and within the scope of the Article. But there is a further consideration already touched upon in paragraph 10 (i) above.

The issue before the Security Council was the alleged threat to peace. The Security Council was, it is submitted, bound by Article 24 of the Charter to assume jurisdiction over it; there is no express limitation in Article 107 upon the competence of the Council and no cross-reference to Article 107[22] in Article 24, which provides that the Council shall be governed only by the purposes and principles of the UN. M. van Langenhove put the point with great force and lucidity: 'How is it possible', he asked, 'to imagine that the UN can fulfil its primary purpose, the maintenance of international peace and security, if the principal Members of the organisation are free to resort to the threat of the use of force from the very moment when they can do so with impunity on German territory or on the territory of any ex-enemy State? . . . In principle there are no exceptions to the competence of the Council other than those provided for by the Charter itself, in other words exceptions which apply to all the Member States. The Charter is a collective treaty concluded for the purpose of safeguarding peace. This is a matter which is of international public competence as among the signatories, and cannot be jeopardised by particular treaties or agreements, except where the Charter may have provided for its being overridden by such private treaties'.[23]

[20] See, para. 10 (iii) above.

[21] Faris Bey el Khouri expressed these views very broadly at S/PV/362, pp. 12–15: 'I do not know if the U.S.S.R. considers that it is responsible for taking such action. Do they have the responsibility for blockading the inhabitants of Berlin? . . . Is that responsibility a result of the last war?'

[22] The only reference to Article 107 elsewhere in the Charter is in Article 53.

[23] S/PV/362, p. 51.

III

The Security Council voted to adopt the identical notes of the three governments on to its agenda by 9–2. How is this decision to be interpreted in the light of the preceding debate?

It is seldom possible to derive exact interpretations of the UN Charter from the decisions of the Security Council nor is it even easy to say always what it is that the Council has decided. It is not a court of law, handing down precise rulings, even though it has certain quasi-judicial aspects. It is a council of ambassadors following a parliamentary procedure; sometimes the diplomatic process is prominent but usually its parliamentary character prevails and its decisions must be looked at for their broad political effect and not as judgments.

We may draw the following conclusions:—

(1) the Council decided that Article 107 did not limit its competence to discuss, make recommendations and take other action upon a threat to peace alleged to exist in Germany by Members of the UN;

(2) for the rest the decision to adopt the agenda was purely procedural [24] and did not prejudge the issue of competence [25] to discuss the Berlin question if raised on grounds other than Article 107;

(3) the adoption of the agenda does not in general prejudge questions of competence, which may, unless the Council otherwise decides, be raised and discussed both before and after the adoption of the agenda.

THE GROTIUS SOCIETY

International Law Conference, 1948

The 1948 Conference of The Grotius Society was held at Gray's Inn on July 10, under the chairmanship of Sir Arnold D. McNair, K.C., President of the Society. In welcoming the Society to the Inn of which Alberico Gentile was a member, Sir Arnold contrasted the outlook for international law today with the position directly after the first world war. A comparison of the Charter of the United Nations with the Covenant of the League showed a much clearer recognition of the necessity of developing international law in the later document. He expressed the hope that the International Law

[24] Mr. Vyshinsky made the somewhat surprising observation in the course of debate, perhaps for tactical reasons, that the question of the Council's competence was procedural. His adverse vote on the adoption of the agenda was not therefore claimed as a veto.

[25] So Faris Bey el Khouri interpreted the decision to adopt the agenda: S/PV/366, p. 56, cf. S/PV/372, p. 21.

Commission recently established by the United Nations would take due note of the disappointing experience of the Codification Commission of the League of Nations. The Commission will undoubtedly receive many requests to submit to the General Assembly draft Conventions for the creation of new law. But as regard existing law, it was hoped that it would abstain at this stage from preparing draft Conventions and would set on foot a co-ordinated movement for a scientific and non-official restatement of existing law. In this work, the Commission ought to enlist the co-operation of the leading societies concerned with international law in every country, such as the Institute of International Law, the International Law Association and the Grotius Society.

Sir Arnold McNair concluded his presidential address by saying that he felt sure that the Grotius Society would gladly co-operate in the task of the International Law Commission towards the progressive development and codification of international law.

The first of the two important problems of international law discussed at the Conference was the 'Concern of International Law with the Individual', on which a paper had been prepared by Mr. Richard O'Sullivan, K.C. 'In recent years in England and in America', said Mr. O'Sullivan, 'one school of legal opinion had declared that the conception of natural law had been undermined by historical and philosophical criticism. Natural law and an ultimate standard of justice were said to be examples of "illusion on illusion". For this school of thought the State was omnipotent and the sole source of law. Another school of jurists, which included Dean Pound and Justice Douglas of the Supreme Court of the United States, recognised that in conscience there is a moral power higher than the State. The re-affirmation in the Charter of the United Nations of faith in fundamental Human Rights and in the dignity and worth of human personality carried with it the restoration of the conception of natural law as a principle of paramount authority in human affairs and the recognition to the individual of an international status'.

A discussion followed, opened by Dr. Idelson, who said that it was gratifying to note that the idea that the individual enjoyed rights under international law and as a subject of that law, has now become more important than ever before. It was therefore regrettable that today the State has assumed such a wider control of practically everything and this has resulted in the elimination of individual will and individual creative power.

In the afternoon session which was presided over by Sir Cecil Hurst, Vice-President of the Society, a very informative paper was read by Sir William McNair, K.C., on the 'Legal Aspects of State

Shipping', in which he examined in detail the provisions of the Brussels Immunity Convention of 1926. Sir William doubted whether the Convention provided a satisfactory solution for the problems connected with State-owned vessels engaged in ordinary commercial trading. The difficulties in fact of applying its provisions in practice were manifest. Moreover, the Convention gave a right to each contracting State to suspend the application of the Convention in time of war. The proper interpretation to be given to the term 'war' was a proper war and the suspension did not therefore apply to a state of emergency.

Mr. Cyril Miller, in opening the discussion on Sir William McNair's paper, said that the shipping industry in Great Britain felt the urgent necessity of some unity in the laws of maritime countries. Although the Brussels Convention of 1926 was by no means completely satisfactory, it was very desirable that steps should be taken to ratify it as offering some measure of uniformity.

The Conference was preceded by a dinner given by the Society at Gray's Inn Hall on July 9, at which the principal speakers were Lord Schuster and Lord du Parcq.

Lord Schuster said that a fundamental change had taken place in the outlook of the ordinary British subject towards the significance of the position occupied by these islands in the world and the implications of the disastrous results of a war. We had now become a nation making a great sacrifice for the cause of peace. The same attitude was visible in the great 'Republic beyond the seas' which was, in fact, giving Europe help with a consciousness that its fate was linked with ours and ours with Central and South Eastern Europe. Several of the agreements between the Allies which preceded and followed the conclusion of the war were marked by lack of precision and a regrettable difference of opinion as to the meaning of the same words. In future, we ought to make certain that the other nations meant the same thing that we did. The Grotius Society could be of enormous use in defining the rules of international law and of the conduct which ought to govern international treaties in future. That was the object at which its members ought to be aiming and to build thus something which was imperishable.

Lord du Parcq said that we could not get justice without law, but that it was possible to get law without justice. We must satisfy the peoples of the world that international law is based on justice. We have now an International Court at The Hague—perhaps not as occupied as might be wished—where judges were conscious that they were international judges and not merely subjects of their

particular nations. Thus, although the court had still far to go, we could look to The Hague as one of the hopes for the future. There was no reason why nations should not make a greater use of that court by submitting all their legal controversies to its impartial decision. The court would in due course build up a set of judicial precedents. It was for this reason that he was glad that there existed such bodies as the Grotius Society.

THE UNITED STATES CONGRESS AND DEVELOPMENT OF FOREIGN POLICY

Recently the *American Bar Association Journal*, circulating among thousands of members throughout the United States, initiated its new Department of Legislation. The Editor-in-Charge is Professor Harry W. Jones of the Legislative Drafting Research Fund of Columbia University Law School. The role of Congress in the Development of Foreign Policy is discussed in the September issue.

He analyses the increasing and salutary participation of the Congress in the making of American foreign policy. There is a growing Congressional awareness of ' the inseparability of American foreign and domestic legislative policy '. This trend has reached a peak of public interest with the enactment of the Economic Co-operation Act of 1948 with its vast programme of foreign aid. The Act's legislative history is necessary reading not only for students of American foreign policy but for those interested in the functioning of the checks and balances of the American constitutional system. Political partisanship was wiped out during the Congressional debates on the Administration's Marshall Plan proposals. Senator Vandenberg and other leaders made it clear that they were acting as officers of Congress and not as agents of the executive department. The final enactment of the statute was not a rubber-stamping of the Executive programme, but rather the expression of Congressional satisfaction.

The impact of the spending power on the post-war foreign policy of the United States has changed the relationship between the President and the Congress in the foreign affairs field. The result has been to lessen the significance of the treaty power and the President's possession of the diplomatic powers. Continuing crisis conditions have compelled acceptance of a foreign policy pattern that cannot be carried into execution without the support of both houses of Congress.

The capacity of Congress to contribute to the shaping of foreign policy has been long doubted by foreign policy writers. The channels of diplomatic information which influence the formulation

of foreign policy go to the President and not to the Congress. There is now need to develop a procedure calculated to give Congress a basic background of information and insight indispensable to sound legislation in the field of foreign policy as in other legislative areas.

The Congressional grasp of the issues involved in the Economic Cooperation Act was due to the following factors:—

(1) Past participation of individual Congressional leaders in international negotiations and foreign policy discussions;
(2) the excellence of exploratory and explanatory work by Ambassador Lewis Douglas for the State Department in preparation for the hearings; and
(3) the confidence of the Senate and House Committees in the report of the non-governmental Committee on European Recovery and American Aid known as the 'Harriman Committee'.

The seriousness with which members of Congress addressed themselves to these issues is the most persuasive proof that an informed Congress can participate constructively in the development of foreign policy.

Such participation in foreign policy decisions will cause characteristic problems. These would include possibilities of House-Senate differences, and jurisdictional frictions between standing committees, as in the case of other legislation. Frank comment on the intentions and actions of friendly governments candidly expressed in debates and committee hearings may come as a shock to those trained in the tradition of discreet diplomatic procedures. However, the difficulties and delays incident to a wider Congressional participation in the foreign affairs field might be more than compensated for by the advantage of having an American foreign policy based on an intelligent Congressional decision as well as on the judgment of the President and State Department Advisers. Such a foreign policy might be expected to put down deeper roots and possess greater stability than one formulated solely by the President and the State Department. This trend brings an integrating factor between the Presidency and the people.

This increasing impact of Congress on foreign policy is more broadly based than the proposals of the foreign aid programme. The increasing international responsibilities of the United States project the legislative function of Congress into international areas. This embraces such subject-matters as tariff and immigration policies. These and other policy issues carry both domestic and international implications.

Professor Jones sums up his conclusions by the statement that

continuing Congressional participation will bring about a ' deepened awareness of the inseparability of American foreign and domestic legislative policy '.

IMPERIAL CONSTITUTIONAL DEVELOPMENTS

EIRE

Ireland has been the sport of freak constitutions since the day the Milesians landed upon an island each of whose three Kings ruled in annual rotation and their respective Queens each gave her name to the country during her year of office—Eire, Banba, and Fodla. There was no effective government of the whole country by the British until 1617 since when it may be accepted that ' The King de facto in Britain is the King de jure in Ireland ' up to 1937, but the application of the doctrine has not always been happy.

We are now concerned only with the thirty years since 1918. The first Great War had effected a spiritual Union of Irishmen for the first time in history but that was shattered in Easter week of 1916 and no effective constitution was in force from 1918 until 1921. In the following year three provinces and a bit of the fourth became the Dominion of the Irish Free State whose constitutional rights and limitations presented no difficulties. In fifteen years most of the provisions of the settlement made after the war were uprooted in accordance with the invariable desire of institutions new to the task of government. A new freak constitution was adopted, with a citizenship law that embraced millions of Americans if one parent was Irish-born. This document did not mention the Crown and purported to institute a Sovereign State in which the King had no part. But by a contemporaneous Act, the King was in fact entrusted with the conduct of ' External Relations ' and has since figured as the authority on whose behalf the representatives of ' Eire ' abroad have acted. The change of name was ratified by the statute confirming the agreement of 1938,[1] which carefully avoided any enlightenment on the dubious question of what was the position of this part of Ireland in relation to the Commonwealth. That question was answered four years later (*Murray* v. *Parkes*, [1942] 2 K.B. 123). A number of Irish-born residents in Britain refused to obey the call-up during the war on the ground that citizens of Eire were not British subjects. There could be no doubt that if by her constitution Eire was a foreign country according to international law, persons born in that territory were no longer

[1] Eire (Confirmation of Agreements) Act, 1938.

subjects of the Crown. The court held, and rightly held, that the men were not foreigners. The judgment was arrived at on considerations of British municipal law interpreting the Eire constitution.

In the debate in the House of Lords on December 15 last, a number of speakers appeared to think that the constitutional position of Eire had been fixed by a Government declaration which had at the time been made in the following terms:—'We are prepared to treat the new constitution as not effecting a fundamental alteration in the position of the Irish Free State'.

It was quite within the power of the several members of the Commonwealth to determine whether they would keep in or put out Eire with regard to their voluntary association, but it is very debatable whether the U.K. Government could themselves decide that the new Republic should be a foreign Power or not. That is a matter beyond declaration or policy. It is settled by international law and one of the main conclusive considerations is how does this newly born State conduct its foreign affairs? The opinion of one or both of the countries concerned does not matter. The only sovereign known to the Society of Nations regarding Eire's external affairs was the King, in whose name Eire's agents were accredited. Externally, therefore, Eire lacked the most important feature that would render her a foreign State. She could not be 'foreign' while she shared the authority of the Crown in appointing her representatives abroad.

At the end of July, 1948, Eire had been held by competent authority not to be a foreign country and her Irish-born citizens not to be foreigners. It was in those circumstances that the British Nationality Act was passed with its peculiar provisions dealing with the position of the citizens of Eire. The Act recognises in the clearest manner that the body politic therein called Eire is not foreign and that her citizens are not aliens. She remains, as regards the outside world, a member of the Commonwealth household and the world does not ask what position she occupies within. Under the Act her position is a very queer one. It is quite clear that the members of what had been the other Dominions could not agree upon any clear statement about it, so important matters have to be inferred that should have been expressly set forth. Section 1 is on this plan:—'Every person who under this Act is a citizen of the United Kingdom and Colonies or who under any enactment for the time being in force in any country mentioned in subsection (3) of this section is a citizen of that country shall by virtue of that citizenship have the status of a British subject'. Eire is omitted from subsection (3). There is no clear statement as to the result of this. In terms the section is inclusive, not exclusive.

The legislation by obliquity proceeds:—Section 2: 'Any citizen of Eire who immediately before the commencement of this act was also a British subject shall not by reason of anything contained in section 1 of this Act be deemed to have ceased to be a British subject, if at any time he gives notice in writing to the Secretary of State claiming to remain a British subject on all or any of the following grounds, that is to say, (a) . . .; (b) . . .; (c) that he has associations by way of descent, residence or otherwise with the United Kingdom or with any Colony', etc. The Secretary of State has no power or duty in regard to the notice, he cannot object to the 'otherwise' allegations, he is not required to keep or file the notices or any record of them. They could be served at any time and perhaps when served would relate back to the passing of the Act. Inferentially, until he serves a notice an Irishman might be deemed to have ceased to be a British subject. But the moment this position seems to him inconvenient, he can serve a notice and 'remain' one ab initio.

The notice must be a notice of claim to 'remain' a British subject. It may be served 'at any time' which would cover the lifetime of the applicant. What may be his position pending service is, of course, not stated, but he cannot 'remain' a British subject if section 1 has already caused that he be deemed to have ceased to be one. That the section should operate requires that it should not operate to alter status until the person affected has failed to serve a notice 'at any time' during his life, and that period seems to expire with himself. On this view there is nothing to be gained or lost by the notice. The section is mere nonsense. On the other hand a claim to be registered followed by registration under sections 6 and 9 confers a citizenship akin to naturalisation.

If the matter had rested there it is apparent that, in hope of escape from national service, some citizens might be glad to cease to be British subjects until they saw how the advantage lay. The provisions in section 3 of the Act are, however, ambiguous. Subsection (1) deals with offences committed 'in any country mentioned in subsection (3) of section 1 of this Act or in Eire or in any foreign country'. 'Eire', as there mentioned, is obviously not a foreign country. Subsection (2) becomes important: 'Subject to the provisions of this section any law in force in any part of the United Kingdom and Colonies . . . shall . . . continue to have effect in relation to citizens of Eire who are not British subjects in like manner as it has effect in relation to British subjects'.

All Irish-born citizens of Eire resident in the United Kingdom were British subjects and subject to all its laws prior to the Act. They were all potential British subjects after the commencement

of the Act needing only a notice to prevent their being ' *deemed* to have ceased to be ', and the provision that all laws shall ' continue ' to have effect suggests that failure to serve notice does not outlaw them or help them and, pending service, they are treated at least as embryo citizens. They were in a very puzzling constitutional position. Theirs was not a foreign country, they were not aliens, they were British subjects at common law, there was no definition of their status pending notice and notice itself only forbade an inference against them under section 1. While Eire remained unchanged they were in suspense subject to all British municipal law.

Section 6 of the Act falls also to be considered in this connection: '(1) . . . a citizen of any country mentioned in subsection (3) of section 1 of this Act or a citizen of Eire . . . shall be entitled on making application therefor in the prescribed manner to be registered as a citizen of the United Kingdom and Colonies if he satisfies the Secretary of State either (a) that he is ordinarily resident in the United Kingdom and has been so resident throughout the period of twelve months or such shorter period . . . immediately preceding his application '. Mark the word ' entitled '.

Section 9:—' A person registered under any of the three foregoing sections shall be a citizen of the United Kingdom and Colonies by registration as from the date on which he is registered '.

In December, 1948, the Eire Parliament passed an Act repealing the provision under which the external relations of that country were transacted by representatives in the name of the King and declaring the State a Republic. When this Act comes into operation there will appear in the world an entirely new country having the vital attribute of international sovereignty and the unchallenged right to conduct its foreign affairs by agents accredited by itself. The political community called ' Eire ' in July, 1948, will disappear. An absolutely different political community will arise as an international person whose citizens abroad will become different legal persons. When this step was introduced in the Dublin assembly the British Government published a pronouncement that ' The United Kingdom will not regard the enactment of this legislation as placing Eire in the category of foreign countries or Eire's citizens in the category of foreigners '. Apparently the Executive was under the impression that the Government had the decision of this matter at their disposal and that the previous question of the result of the Eire constitution of 1937 had been settled by a similar pronouncement. A small boy seeing a hippopotamus for the first time declared: ' I won't believe it '. Refusing to ' regard ' cannot alter the international fact that this legislation must place Eire in the category of foreign countries and her citizens in the

category of foreigners. The reception by the other nations of the world of diplomatic agents accredited by the Republic and not by the King creates a new State foreign to the United Kingdom and all others. Its citizens are aliens outside its boundaries unless the situation is altered by statute and the municipal law affecting aliens made inapplicable to them. The Lord Chancellor said in the House of Lords during the December debate that there exists a statute which prevents the operation of international law and that is the British Nationality Act. The pronouncement of the Government appeared to declare that the Executive would ignore and annul the law by its volition without seeking amendment of the law by Parliament. Lord Jowitt stated that 'Eire is Eire'. . . . 'So long as the 1948 Act remains the law under section 3, subsection (2), the Eire citizen will be treated as if he were a British subject'.

There is a widespread delusion that those who use the same words must mean the same thing. Unfortunately we do not have sufficient words to cope with the unlimited concepts of the human mind, and the same words rarely say identically the same thing. 'Eire' in international law must thus have two uses. It may be a geographical term as in the statute of 1938 but citizenship is not geographical but political, for 'citizen' denotes a constituent form of political community. If the community is essentially changed he becomes a different legal person. 'Eire' in the Nationality Act in conjunction with 'citizen' meant a political organisation then in existence in a certain locality. That organisation seems to have gone with the establishment of the Republic. Only the label of the locality remains. It is not to the name that a citizen bears allegiance but to the political thing, and when that is changed there is a new citizenship. The citizen of Eire in the statute was at the time a member of a State within the Commonwealth, a country that was not foreign. He was a person who was a British subject and retained the right to remain a British subject. Even if he were not a British subject, he was given by the statute a right to become so by registration. The citizen of the new 'Eire' is an alien by Irish law, his country is a foreign country; he cannot 'continue to be subject to laws under the section already quoted (which in terms applies to every citizen of Eire, including those in the U.S.A.) if he never came within the jurisdiction until Eire had for the first time become an independent Sovereign State in international law. Of all freak constitutions this would deserve notice. The subjects of a foreign State would have the right to invade Britain in unlimitable numbers, and on coming within three miles would be endowed with all the rights and privileges of the native citizens although they would not be required to become subjects of the

King. In addition, they would have the assistance and protection of their own ambassador. In the construction of the statute one can understand indulgence being extended to a rather wayward sister in the Commonwealth, but to confer such rights on aliens would surely require very clear language. In documents where *personæ* are affected, the identity of the *persona* must be established. If a testator leaves a legacy to John Smith of Blackacre and dies years afterwards, there may then be another John Smith in Blackacre; but if he is not the person designate but a stranger, the correspondence of the name and description will not establish his identity with the legatee. The Republic that did not exist at the passing of the Nationality Act cannot be the Commonwealth member that then existed in the same place under the same name.

The result of this Irish legislation in affecting the status of Irishmen in Britain is a matter of the gravest concern. If brought before the courts it must be determined according to law by a decision based on legal principles, notwithstanding the ensuing chaos. Judges have no power to legislate even in such emergency and have no right to disregard the law. The constitutional lawyer instinctively assumes that all difficulties caused by this sudden incursion of the new Republic into the international world can be cured by statute. In theory this is true, but the simplicity of the remedy, like the simplicity of the Irish enactment, is misleading. The Republic of Ireland can indeed do what it likes. It springs into being untrammelled by previous existence, by agreements or conventions, free to make what bargains it can with all other States. The old established Britain has been in the world too long to enjoy irresponsibility. She is under obligations which severely limit the theoretical omnipotence of Parliament.

In truth International Law is beyond the jurisdiction of Parliament and the trouble created by the outburst of Irish patriotism is the conflict it invites with the settled rules of conduct between Independent Sovereign States. It is amazing that statesmen should seek in effect to legislate for the world by issuing a declaration that their Government would not 'regard' the Republic of Ireland as a foreign country or regard its citizens as aliens. Every Independent Sovereign State is 'foreign' to all others in the Society of Nations and its citizens are aliens outside its boundaries. Neither declaration nor statute can change that international fact.

Theoretically a statute could confer rights of citizenship on selected classes of aliens and special privileges of commerce, or might even declare that a foreign State shall not be deemed to be a foreign State. In practice such a course would appear to be

almost impossible. It would be a fraud on existing agreements with other countries. With a score of Governments Britain has pledged her word :

> ' Any privilege, favour or immunity which either contracting party has actually granted or may hereafter grant to the ships and subjects or citizens of any other foreign State shall be extended simultaneously and unconditionally without request and without compensation to the ships and subjects of the other.'

If Britain should seek to evade such obligations by passing statutes declaring that this country or that shall not be regarded as a foreign State these agreements would be denounced and it would be very difficult to negotiate others. It might be possible to devise political enfranchisement of resident aliens that would not be objectionable, but in these days of jealously conflicting economies small pebbles threaten to raise big waves in the international ocean, as is shown by the simple little statute now suspended in Dublin.

Politics and economics are so intimately interwoven that it may be difficult to contend that admission of one foreigner to citizenship would not give to him a commercial advantage over the subject of another State compelled to trade as an alien within the realm, and the whole policy of political enfranchisement of colonies of persons whose primary allegiance and whose sympathies are elsewhere may not command enthusiasm among the British themselves.

The position of the multitudinous Irish within the realm while the Republic is in suspense is befogged by the British Nationality Act, but without a daring innovation in International Law the establishment of the new State must result under the existing law in sweeping out of public life many thousands of useful servants of the United Kingdom and the disfranchisement of hundreds of thousands of electors. The prevention of this disaster will strain the ingenuity of all statesmen concerned.

[*Contributed by* Serjeant A. M. Sullivan, K.C.]

On January 1, 1949, the Eire Government passed two Orders granting to citizens of the United Kingdom, the British Colonies and New Zealand rights in Eire similar to those enjoyed by the citizens of Eire resident in Great Britain. These two Orders coincided with the coming into operation of the British Nationality Act, 1948. New Zealand is so far the only other Commonwealth country which has adopted legislation similar to that of Great

Britain, but the Eire Government declared its intention to make Orders in respect of other Commonwealth countries as soon as they enact such legislation. [EDITOR.]

AMERICAN BAR ASSOCIATION

Section of International and Comparative Law

The Annual Meeting of the Section met in the Federal Court House, Seattle, Washington, during the American Bar Association Convention in September, 1948. Resolutions were approved during the first session based on the reports of the following committees on Latin-American Law, Pacific Settlement of International Disputes, and International Interchange of Jurists.

I. In the absence of Edwin D. Ford, the distinguished chairman of the Latin American Law Committee, his partner, A. D. G. Priest, proposed a resolution for the establishment of a Latin American Bibliographical Centre. The resolution was unanimously carried, requesting the American Bar Association to affirm : (1) its endorsement and support of the establishment of a Centre for the collection, co-ordination, editing, translation, publication and dissemination of bibliographical information concerning Latin American law, jurisprudence and publications of interest to the legal profession; (2) its request to the Committee on Latin American Law of the Section of International and Comparative Law of the American Bar Association to work with the Inter-American Bar Association, the Pan-American Union and other interested associations and agencies for the establishment and financing of such a Centre; and (3) its recommendation that the Centre be established under the direction of the Library of Congress and the Congress be further urged to appropriate such funds as, together with funds furnished by other countries of this hemisphere and by private subscription and donations, shall be required for the establishment and maintenance of such a Centre. This resolution was adopted by the House of Delegates of the American Bar Association.

II. Mr. Edward Allen, in the absence of Professor James Oliver Murdock of George Washington University, reported for the Committee on the Pacific Settlement of International Disputes. The first recommendation urging a broader use of commercial arbitration was carried and adopted by the House of Delegates. The second recommendation related to the American Treaty on Pacific Settlement signed at Bogota on April 30, 1948.[1] It sought the rejection of the Treaty on the ground of ambiguity in Article VII to which the United States had, by reservation, refused to become a party. In

[1] See also Vol. I, I.L.Q., p. 463.

effect it adopted the Calvo Clause and barred diplomatic protection to the rights of a foreigner who had resorted to the courts of the country. An extended discussion followed with participation by Professor Carlson, University of Illinois; Professor Brocklebank, University of Idaho; Paul Weiden of New York; Preston Richards of Salt Lake City, former Assistant Solicitor of the State Department; and Judge Brand of the Supreme Court of Oregon and a member of one of the Panels at Nuremberg. A modified resolution was finally passed carrying the proposal that the Government of the United States consider convening in Washington in 1949 a special Pacific Settlement Conference of American States to re-negotiate an American treaty on Pacific Settlement.

III. A resolution from the Committee on the International Interchange of Jurists was adopted recommending that the Congress of the United States appropriate adequate funds for the exchange of students and teachers especially in the field of law, as authorised by the Buenos Aires Convention, the Smith-Mundt Act and the Fulbright Act.

At the second session of the Section reports were made by the Committee on Private Claims Against Governments and the Committee on International Trade Regulation.

On September 8 the Section held a special meeting to consider the report of the Committee on Offences Against the Law of Nations. Committee chairman Wennerstrum moved the adoption of a resolution. It proposed: (1) a thorough study of the many questions stemming from the growing interest in the legal concept and procedure to be followed in future war crime trials, and (2) that the committee be continued with direction from the Section for the completion of the study and report. Dean Storey then moved the adoption of a substitute resolution which had been adopted at The Hague meeting of the International Bar Association.[1] This resolution asserted (1) that the effective administration of international law requires individual responsibility for its violation, with competent courts of compulsory jurisdiction for trial of such offenders and adequate enforcement of decisions, and (2) that the United Nations take action to establish sufficient tribunals and enforcement procedure, including necessary police forces.

Captain Robinson, who stated that he was present at Judge John B. Barker's request, presented a resolution approved earlier in the day by the Section on Criminal Law. This resolution proposed: (1) that the American Bar Association take action to establish recognition of the fact that the initiation and the waging of war in violation

[1] See Editorial Note, *supra*, p. 635.

of treaties and other established international laws are criminal acts; and (2) that the Association offer to the United Nations, to the United States Department of State and to other agencies such assistance as will be practicable in bringing to justice individual offenders guilty of committing such unlawful acts; and (3) specifically that the Association offer its co-operation in the appointment of an Advisory Committee of Lawyers to assist in establishing by treaties and by all other lawful means, (i) international criminal codes, both substantive and procedural; (ii) jurisdictional powers to be placed in appropriate courts over international criminal cases; and (iii) international peace guard forces to execute the lawful orders and judgments of such courts.

Edward Hemphill of Florida asked the Section to consider whether the War Crime Trials were trials in the Anglo-Saxon sense, and whether conquerors can give fair trials to the conquered, whether it was advisable for Supreme Court justices to participate in war crime trials and, among other things, whether direct trials of nationals should be reconsidered. Judge Brand then spoke in defence of the fairness of the War Crime Trials. Robert H. Fraser of Greensboro, North Carolina, recalled interesting analogies to the modern war crime trials in the trials held in the south after the Civil War which were actually begun but were abandoned when General Grant refused to prosecute General Lee. A general discussion followed including Judge Wilkins of the Superior Court of the State of Washington who was also one of the Nuremberg judges.

Following the discussion all of the previous motions were withdrawn and Captain Robinson presented a substitute, which contained the following points :

(1) That effective administration of international law requires individual responsibility for its violation with competent courts of compulsory jurisdiction for trial of such offenders and enforcement of its decisions.

(2) That the American Bar Association recommends to the United Nations that it take appropriate action to establish tribunals and enforcement procedure, including necessary police forces.

(3) That the American Bar Association respectfully tenders its assistance in formulating provisions appropriate to the above ends.

Mr. Morris and Dean Storey agreed to the substitution and the resolution was unanimously adopted. After debate, the House of Delegates deferred action on this resolution until the mid-winter meeting.

Due to the intense interest in the War Crimes Trials discussions,

the Seattle sessions of the Section completed an annual meeting regarded by many as the most successful ever held by the Section.

[*Contributed by* Mr. Howard S. Le Roy.]

Military Government Law and British Subjects in Germany

As a result of the unprecedented conditions at present prevailing in Germany, British subjects find themselves deprived of some of the fundamental civil rights which they regard as their natural heritage. This is due in the main to two causes which, operating together, react in practice very adversely to British citizens brought up in the democratic way of life and who are in Germany with the avowed object, amongst others, of teaching these superior ways to our late enemies. In the first place, the form of government in Germany has been, of necessity up to the present time, authoritarian in character. The British Military Governor is the titular head of British-controlled Germany and in him are vested *all* the powers of government. It has been judicially held in the case of *Grahame* v. *The Director of Prosecutions* (C.C.Cr.App., 1947, Vol. 3, p. 168), that his power to legislate over the areas under his control is not limited by previously accepted international law as laid down in section 43 of the regulations respecting the Laws and Customs of War on Land annexed to The Hague Convention, 1907, and that these rules have no application to the present occupation of Germany. The Military Governor for practical purposes therefore has unlimited legislative powers and he has enacted the most far-reaching laws which touch almost every aspect of life in Germany today. These bind Germans and Allies alike.

Many of these enactments have created a host of new offences which are enforceable by means of criminal sanctions. A great number of them were, by their very terms, manifestly intended exclusively for the indigenous population. Ordinance No. I which contains forty-three separate offences was drawn up by the S.H.A.E.F. prior to the surrender. Examples of these offences are as follows: 'Falsely pretending to be a member of the Allied Forces; unlawfully wearing any uniform of the Allied Forces' (para. 8). 'Sabotage of any war material of the Allied Forces or of any installations or property necessary or useful to the military operations or the Military Government' (para. 14). 'Wilfully interfering with or misleading any member of or person acting under the authority of the Allied Forces in the performance of his duties' (para. 17). 'Conduct hostile or disrespectful to the Allied Forces

or to any of the United Nations' (para. 41). Even this enactment has been judicially held on more than one occasion to be applicable to British subjects, as have numerous other ordinances which it is considered would under English rules of construction be deemed inapplicable to citizens of the occupying Powers. These rules, however, do not of necessity apply even to the British. It has been judicially held that 'English law is quite distinct from Military Government Law' and 'In formulating such rules or principles' (*i.e.*, by which Military Government Courts will be guided) 'the Courts are not bound to adopt any particular law, English, German or any other but should act upon principles which are just, logical, etc.' . . . 'In some cases, it may be appropriate to follow English legal principles; in others, German principles may be preferable. In yet others, the formulation of entirely new principles may be necessary.' (Case of *Richard Pahl*, C.C.Cr.App., 1948, vol. 1, p. 74.) Again, it was held in *Swallow's Case* (C.C.Cr.App., 1947, vol. 3, p. 212) that 'the magistrate was mistaken in applying the English law as to powers of arrest. English municipal law is only in force in Germany to such an extent as it is made so by some Military Government Law or Ordinance'.

Section 43 of Ordinance No. I, referred to above, makes 'an act to the prejudice of good order or to the interests of the Allied Forces or any member thereof' a criminal offence punishable by imprisonment. This section, which in effect is the same as section 40 of the Army Act (an act to the prejudice of good order and military discipline), leaves a very wide door open for making any act whatever criminal if it is considered to be against the interest of the Allied Forces or indeed any member thereof. At least one British subject (*Ryder*, C.C.Cr.App., 1947, vol. 3, p. 208) has been convicted under this section. It has been held moreover in *Kerr's Case* (C.C.Cr.App., 1947, vol. 3, p. 236) that the Commander-in-Chief, who is the same person as the Military Governor, can delegate his legislative authority despite the fact that there are good grounds for the view that his own legislative capacity is itself derived from the 'Governments of the Four Powers' in whom sovereignty is vested by the fundamental documents on the control of Germany. Apparently the court considered that the maxim 'Delegatus non potest delegare' has no application. The Military Governor is also head of the Executive which enforces the observance of these laws and, subject only to the Foreign Office, he is also the chief policy maker.

In addition to these powers, the Military Governor appoints the judges of the Superior Courts. It may be said also, in fairness,

that the Legal Division, which is responsible for the administration of justice in Germany, is responsible to the Military Governor and to no one else and by the very nature of its work, vis-à-vis the Germans, is closely identified with the Executive.

The second cause, and the one which makes the above factors operate with peculiar harshness against British civilians, is that the latter are treated in all respects as subject to the 'lex loci', though they are in fact part of the 'occupying forces'. Many of them are doing exactly the same jobs as they did a few months ago as Army Officers, the only difference now being that they have abandoned their khaki and donned a civilian suit. Furthermore, British Military Government Courts, which try all offences against Military Government Law, are considered to be German courts and not British ones, even when British subjects are being tried. Ordinance 72, which defines the procedure in Military Government Courts, has imported into Germany for the benefit of British citizens here, the whole of the substantive criminal law of England. The position, therefore, arises that British subjects in Germany are amenable to:—

(a) German Law (though German courts have no criminal jurisdiction over Allied personnel);
(b) Military Government Law, which is superimposed upon it; and
(c) The whole of English Criminal Law.

The benefits of English procedure, however, are by no means similarly imported in their entirety, but are made applicable to British subjects only in so far as any Military Government enactment so provides. Many of the important constitutional safeguards which English procedure ensures are lacking. The benefit of a jury can only be obtained where a British subject is charged with a capital offence and English rules of evidence are applicable to British subjects only 'so far as practicable' (Ordinance 72). The magistrates of the Summary Courts are considered to be part of the Regional Staff and as such are under the control of the Chief Legal Officers of the regions who are in fact the Legal Advisers to the Regional Commissioners. There have been instances in which Chief Legal Officers have exercised a supervision over magistrates which is inconsistent with their complete independence as judged by British standards.

There is no adequate scheme in force for providing persons accused of crimes with legal aid, and in some cases such accused as could afford it have had to get counsel out from England at their own expense in order to have anything like proper representation. Furthermore, there is no right of appeal to any English

court from a decision of the Control Commission Court of Appeal. This latter factor bears more hardly on the British than might appear at first sight.

In the first place, the technical standard of the judiciary in Germany is not, and cannot be expected to be, as high as that of the Superior Courts in England. Secondly, the very great powers of the Military Governor, which are subject to none of the usual constitutional checks which operate in England, make it all the more necessary to allow for appeals being taken to a tribunal which is at once obviously disinterested and composed of judges of the highest possible qualifications. Moreover, there is an almost total absence in legal division of those reference books, law reports, etc., which are tools of the lawyer's trade.

In the exercise of his powers, the Military Governor has found it necessary to give British Police Officers and Frontier Control Officials, etc., in Germany, extremely wide powers of arrest and search without warrant and seizure of property belonging to British subjects. In the exercise of such powers these officials are declared to be immune from process. Even if such a declaration was not expressly made, it would be extremely difficult, if not impossible, to secure any redress for any possible abuse of privilege in these matters. For one reason, Military Government Courts have been granted no jurisdiction in civil matters so that it would be impossible to sue a British policeman in Germany for false imprisonment or unlawful arrest. Furthermore, in spite of the Crown Proceedings Act, 1947, it is doubtful whether effective action could be taken in England as the question would arise as to whether the official concerned was not acting as agent of the Military Governor, the head of a German 'quasi-state' and not in the capacity of a Civil Servant on behalf of the British Crown. In connection with police powers, it may be of interest that, in *Swallow's Case*, a police officer of the Control Commission who arrested another Control Commission official by locking him forcibly in a room in his own house and without a warrant, was held by the Court of Appeal to have acted legally in spite of the fact that at the date of the incident and at the time of the trial in the Magistrates' Court, legislation giving the police powers of arrest without warrant had not yet come into force. It should be mentioned that Public Safety Branch inform Scotland Yard of British persons convicted in Military Government Courts so that they acquire a criminal 'record' in the eyes of the authorities at home. Persons sentenced to imprisonment have to serve their sentences at a prison which hold both Allied and German personnel and the staff position is such that British prisoners are not at all times under the immediate

control and supervision of British staff but have been unlocked and marched to and from their cells by German warders.

The position of Control Commission officials and their wives and families in the matter of civil rights compares unfavourably with that of both members of the Armed Forces and citizens of the Colonial Empire. Soldiers, sailors and airmen are subject to Military, Naval and Air Force law, which codes are based upon Acts of Parliament passed at Westminster. In addition, courts martial are for some purposes subject to the control of the superior courts in England. A West African negro has in certain cases the right of appeal to the Judicial Committee of the Privy Council. British citizens in Germany, however, who include not only government officials but their wives and families, are amenable to the unlimited legislative power of the Military Governor which is in fact nothing less than legislation by decree, and can only appeal to judges appointed by the same Military Governor and responsible to him. Whilst it is not suggested that the judges lean in any way towards the Executive, it must nevertheless be admitted that the independence of the judiciary as understood in England has no application.

Contributed by Oliver J. Shaw.

Note—When the above article was written in Germany three or four months ago, the position was in all respects as stated. Since that time, however, a report has been submitted by a committee, under the chairmanship of Sir Alexander Maxwell, which was sent out to the British Zone of Germany to investigate the Administration of Justice with special reference to British subjects. This report called attention to many of the defects referred to above and in particular recommended that the judges should be appointed and subject to dismissal by a Minister of the Crown in England and that measures should be taken to secure the independence of the Magistracy by removing them from control by the Legal Officers of the Executive. It is understood that some such reforms have now been effected.

In addition there is in force a limited scheme of Legal Aid which makes provision for the defence of British subjects accused of crime.

O. J. S.

The Amsterdam Assembly of the World Council of Churches and an International Legal Order

The First Assembly of the World Council of Churches, which was held at Amsterdam in August, 1948, has been described as the most significant event in church history since the Reformation, but the

events which led up to it and the activity which flows from it are perhaps of even greater significance.

For two years prior to the Assembly, preliminary studies had been undertaken on a world-wide scale. They resulted in four volumes,[1] one of which was entitled 'The Church and the International Disorder'. This book, prepared for participants in the Assembly, covered a broad field of study concerning the Churches' Approach to International Affairs.

The Churches have for many years shown a growing concern for the relations between the nations. At Amsterdam delegates from 150 Churches or denominations, and from forty-two countries representing nearly the whole of the non-Roman Catholic world, were gathered together for fourteen days (August 22—September 4, 1948). The absence of delegates from the Roman Catholic Church and the Moscow Patriarchate was not the wish of the World Council, and matters of concern both to Moscow and Rome were not excluded from debate.

The field of discussion before the Assembly included subjects which were predominantly theological or social, as well as the study of international affairs. In preparatory conference it was agreed to recommend that the discussion in the latter field should cover four main themes: (1) An International Legal Order; (2) The East-West tension; (3) Human Rights; (4) Power, War and Peace.

1. It was declared unequivocally in the final report of Assembly Section IV which dealt with international affairs that 'the nations of the world must acknowledge the rule of law. We affirm, therefore, that no State may claim absolute sovereignty, or make laws without regard to the commandments of God and the welfare of mankind. It must accept its responsibility under the governance of God, and its subordination to law, within the society of nations. As within the nations, so in their relations with one another, the authority of law must be recognised and established. International law clearly requires international institutions for its effectiveness. These institutions, if they are to command respect and obedience of nations, must come to grips with international problems on their own merits and not primarily in the light of national interests. But unless the nations surrender a greater measure of national sovereignty in the interest of the common good, they will be tempted to have recourse to war in order to enforce their claims'.

The discussions took place in both Delegates sections and Alternates sections meeting simultaneously. The statement of the Alternates which was considered in the drafting of the final report

[1] S. C. M. Press, 56 Bloomsbury Street, London W.C. 1. 12s. 6d. each.

was even more emphatic in this connection : ' The time has come when the nations must merge and exercise in common some portion of their sovereign rights and seek together to create an International Legal Order in which supra-national laws may be made, interpreted and enforced in specific matters of universal concern (for example, atomic energy, armaments and food). A Legal Order means that permanent international relationships shall be determined, as far as possible, by an impartial agency according to standards of justice, and not by temporary or casual power relations to suit the interests of the person, group or nation involved. The Churches must, therefore, encourage the codification of international law, the use of existing international machinery, and the creation of such institutions as shall further the establishment of an international legal order that all people " may lead a quiet and peaceable life " (I Tim. ii 2) '.

In its task for the Codification of International Law, the Commission of the Churches on International Affairs will, no doubt, derive considerable assistance from other legal bodies, both international and national, which are now concentrating their work on a restatement of the existing principles of international law. The work of the social and economic agencies of the United Nations has been more fruitful than has international co-operation in the political field. In areas of political tension, a greater effort must be made to resolve the differences of nations and to improve the administration of justice under law and order throughout the civilised world. If justice is to prevail between the nations, a common foundation of moral ethics such as the sanctity of the pledged word and good faith must be recovered. Progress towards such a common ethos is possible despite the political, economic and cultural divergencies of nations, and it may be that the Ecumenical fellowship in which the Churches are now united will itself foreshadow a world society based upon justice and law without distinction as to race, sex, language or religion.

2. On the East-West tension, the general attitude at Amsterdam was to make a distinction between atheistic nationalism and historical determinism on the one hand, and the struggle for social justice and economic equality on the other. But the practical difference which must be faced concerns the means to be used to achieve the accepted order of reality manifest in and governing human destinies.

3. As regards human rights, the Churches, affirming that all men are equal in the sight of God, declared that the rights of men derive directly from their status as the children of God. It is therefore

presumptuous for the State to assume that it can grant or deny fundamental rights. It is for the State to embody these rights in its own legal system and to assure their observance in practice. Recognising that there are no rights without duties, and that man's freedom has its counterpart in responsibility, the Churches re-emphasised the fact that each person has a responsibility towards his fellows in community. The most fundamental freedom of all is the freedom of every man to worship as he wishes. As an expression of this conviction, the Assembly adopted a 'Declaration on Religious Liberty'. The Churches, through their Commission on International Affairs, have for several years worked to obtain a recognition of religious freedom in the Universal Declaration on Human Rights now adopted by the United Nations,[2] and it is with considerable satisfaction that we may record Article 19 of that Declaration which affirms that: 'Every one has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in teaching, practice, worship and observance'.

4. In the field of 'Power, Peace and War' it would constitute a formidable task to present a statement on the Churches' attitude to war which would command common support. The Churches were unable in 1937 at the Oxford Conference on 'Church, Community and State', to achieve this, and at Amsterdam they were still unable to agree upon one Christian attitude to the problem of war. In present-day circumstances the tradition of a just war requiring a just cause and the use of just means is challenged. 'Law may require the sanction of force, but when war breaks out, force is used on a scale which tends to destroy the basis on which law exists'. The inescapable question therefore arises—Can war now be an act of justice? Unable to answer this question unanimously, the Conference declared that the Churches must attack the causes of war by promoting peaceful change and the pursuit of justice; maintaining good faith and the honour of the pledged word; resisting the pretensions of imperialism; promoting the multilateral reduction of armaments; combating need and despair and promoting spiritual resistance.

The next meeting of the Central Committee of the World Council of Churches will be held at Chichester from July 9 to 15, 1949, under the Chairmanship of the Rt. Rev. Dr. George Bell, Bishop of Chichester.

Contributed by the REV. E. PHILIP EASTMAN, *Secretary to the Commission of the Churches on International Affairs.*

[2] At Paris, Dec. 10, 1948.

REVIEW OF CASES

ENGLAND

IN RE THE FOREIGN JUDGMENTS (RECIPROCAL ENFORCEMENT) ACT, 1933

Syal v. *Heyward and Another*

Court of Appeal. July 23, 29, 1948

(Scott, Cohen and Wrottesley, L.JJ.)

The Facts.

On February 12, 1947, the plaintiff, S. G. Syal, an Indian moneylender, obtained judgment against the defendants. Lt.-Col. R. A. M. Heyward and Lt.-Col. I. A. David, from the first civil judge at Saharanpur, India, on a plaint dated November 19, 1946, in which he alleged that the defendants had borrowed Rs. 20,000 from him on October 7, 1946, and had executed a promissory note for that amount. On November 28, 1947, an order was made by the master that the judgment be registered as a judgment of the King's Bench Division, pursuant to the provisions of the Foreign Judgments (Reciprocal Enforcement) Act, 1933. The defendants applied for an order that the registration of the judgment should be set aside pursuant to section 4 of the Act [1] on the ground that the judgment had been obtained by fraud. In support of that application they filed an affidavit in which they alleged that the amount which they had borrowed from the plaintiff was not Rs. 20,000 as alleged by him in the action, but only Rs. 10,800, the difference being made up in part of commission and in part of interest which, as the defendants alleged, the plaintiff had insisted on being paid in advance. In reply to the affidavit of the defendants, the plaintiff put in an affidavit in which he denied the material allegations made by the defendants and alleged that the whole of the Rs. 20,000 claimed by him had been advanced. The main basis of the defendants' allegation of fraud was that the plaintiff had deceived the court by pretending that he had lent Rs. 20,000, whereas, in fact, he had only lent Rs. 10,800, thereby concealing from the court the possibility that the defendants might have a defence under the Indian Usurious Loans Act, 1918, which

[1] 'On an application in that behalf duly made by any party against whom a registered judgment may be enforced, the registration of the judgment: (*a*) shall be set aside if the registering court is satisfied . . . (iv) that the judgment was obtained by fraud.'

corresponds to the Moneylenders Acts in this country. On the above evidence the matter came before the master on June 1, 1948, when he dismissed the application on the ground that all the facts on which the defendants relied were known to them at all material times and could have been raised by way of defence in the Indian proceedings. The defendants appealed to the judge, and, before the matter came before him, they filed evidence in answer to the affidavit filed on behalf of the plaintiff. The matter came before the judge on June 11, 1948, and he ordered that if the sum of £1,800 (such sum being in part the equivalent sterling value of the judgment debt, the balance being a security for costs), was paid into court by the defendants within fourteen days from the date of the order, an issue should be tried, and that failing the payment into court of the sum specified within fourteen days the appeal should be dismissed with costs. The defendants appealed from that part of the order which imposed the condition of payment into court as a term of directing the trial of an issue, and the plaintiff cross-appealed from the reversal by Jones J. of the master's order refusing to direct the trial of an issue.

It was submitted for the plaintiff that (1) the fraud contemplated by section 4 of the Foreign Judgments (Reciprocal Enforcement) Act, 1933, is fraud on the court. Unless the court has been deceived the section is not applicable. (2) An application under section 4 should be treated in the same way as, before the Act of 1933 came into force, an action to set aside a judgment would have been treated. (3) Precisely the same tests apply whether the judgment sought to be set aside is a foreign judgment or an English judgment. (4) Where judgment is sought to be set aside on the ground of fraud, the fraud must have been discovered by the applicants since the date of the judgment. (5) It was plain that the facts relied on in the present case were all known to the defendants before the date of the Indian judgment.

The only proposition causing the court real difficulty was the fourth, to which the burden of the judgment referred.

The Judgment.

For the fourth proposition the plaintiff relied on *Boswell* v. *Coaks (No. 2)*,[2] a decision of the House of Lords applied in *Birch* v. *Birch*.[3] These cases, no doubt, establish that in proceedings to set aside an English judgment, the defendants cannot ask for a re-trial of the issue of fraud as between them and the plaintiff on

[2] (1894) 86 L.T. 365 (footnote).
[3] [1902] P. 130.

facts known to them at the date of the earlier judgment; but in cases under section 4 of the Act of 1933, the question is not one of fraud on the plaintiff, but of fraud on the court, and it seems to us to be clearly established by authority binding on us, that if the defendant shows a prima facie case that the court was deceived, he is entitled to have that issue tried even though in trying it the court may have to go into defences which could have been raised at the first trial. See *Abouloff* v. *Oppenheimer*,[4] as explained in *Vadala* v. *Lawes*,[5] where Lindley L.J. immediately after the passage we have already cited, says: 'Another general proposition which, speaking in equally general language, is perfectly well settled, is, that when you bring an action on a foreign judgment, you cannot go into the merits which have been tried in the foreign court. But you have to combine those two rules and apply them in the case where you cannot go into the alleged fraud without going into the merits. Which rule is to prevail? That point appears to me to have been one of very great difficulty before the case of *Abouloff* v. *Oppenheimer*.[4] At the time when that case was decided, namely, in 1882, there was a long line of authorities including *Bank of Australasia* v. *Niass*,[6] *Ochsenbein* v. *Papelier*[7] and *Cammell* v. *Sewell*,[8] all recognising and enforcing the general proposition, that in an action on a foreign judgment you cannot re-try the merits. But until *Abouloff's Case*[4] the difficulty of combining the two rules and saying what ought to be done where you could not enter into the question of fraud to prove it without re-opening the merits, had never come forward for explicit decision. That point was raised directly in the case of *Abouloff* v. *Oppenheimer*, and it was decided. I cannot fritter away that judgment, and I cannot read the judgments without seeing that they amount to this: that if the fraud upon the foreign court consists in the fact that the plaintiff has induced that court by fraud to come to a wrong conclusion, you can re-open the whole case even although you will have in this court to go into the very facts which were investigated, and which were in issue in the foreign court. The technical objection that the issue is the same is technically answered by the technical reply that the issue is not the same, because in this court you have to consider whether the foreign court has been imposed upon. That, to my mind, is only meeting technical argument by a technical answer, and I do not attach much

[4] (1883) 10 Q.B.D. 295.
[5] (1890) 25 Q.B.D. 310, 316.
[6] (1851) 16 Q.B. 717.
[7] (1873) L.R. 8 Ch. 695.
[8] (1860) 5 H. & N. 728.

importance to it; but in that case the court faced the difficulty that you could not give effect to the defence without re-trying the merits. The fraud practised on the court, or alleged to have been practised on the court, was the misleading of the court by evidence known by the plaintiff to be false. That was the whole fraud. The question of fact, whether what the plaintiff had said in the court below was or was not false, was the very question of fact that had been adjudicated on in the foreign court; and, notwithstanding that was so, when the court came to consider how the two rules, to which I have alluded, could be worked together, they said: " Well, if that foreign judgment was obtained fraudulently, and if it is necessary, in order to prove that fraud, to re-try the merits, you are entitled to do so according to the law of this country ". I cannot read that case in any other way '.

In the present case it is plain that the defendants are alleging a fraud on the court and it is, therefore, immaterial that to establish their allegation they will have to adduce evidence which was available to them before the date of the Indian judgment.

As a subsidiary point, the plaintiff contended that the defendants had failed to establish a prima facie case of fraud. We are unable to accede to this argument. It may well be that the plaintiff will rebut that prima facie case, but we think that the evidence filed by the defendants discloses sufficient evidence of a case to entitle them to an issue.

We turn therefore to the defendants' appeal. It was argued that under the Act and the rules, the court had no power to impose as a condition of directing an issue that the defendants should bring money into court. In our opinion this contention is well founded. Neither the Act nor the rules in terms confer such a power. In this respect the contrast with Order 14, rule 6, and with Order 27, rule 15, both of which expressly empower the court to impose terms as a condition, in the first case of giving leave to defend under Order 14 and in the second case of setting aside a judgment, is marked. In proceedings under the Act of 1933, the court is not bound to direct an issue. It should not do so unless in the case of an application based on an allegation of fraud it is satisfied that a prima facie case of fraud on the court is established. But if it is so satisfied, we can see no justification for such an order as Jones J. has made in this case. In this connection it is not immaterial to observe that in a proper case the court may require security from a plaintiff seeking to enforce his judgment. (See section 3 (1) (*a*) of the Act, and Order 41B, rule 3.)

It is to be observed that under the rule the plaintiff may be ordered to find security to include the cost of proceedings to set

aside the registration. For these reasons at the conclusion of the hearing we dismissed the plaintiff's cross-appeal and varied the order of Jones J. in the manner asked for by the defendants, namely, by directing an issue subject only to the defendants bringing into court £810, the agreed sterling equivalent of Rs. 10,800, an offer they had made in the court below and repeated in this court.

Appeal allowed. Cross-appeal dismissed.[1]

[Reported in [1948] K.B. 443.]

NOTES ON ENGLISH DECISIONS IN PRIVATE INTERNATIONAL LAW CASES

INTERNATIONAL CONTRACT—PROPER LAW OF SEPARATE ASPECTS

Frankmann v. *Anglo-Prague Credit Bank*, [1948] 2 All E.R. 1025.

On November 4, 1948, the Court of Appeal (the Lord Chief Justice, Lord Justice Asquith and Lord Justice Singleton) reversed the decision of the court below in *Frankmann* v. *Anglo-Prague Credit Bank*,[2] in which the plaintiff, whose title thereto was not in dispute, sought to recover possession from the London branch of the bank, three registered debentures of £100 each, part of the English issue of the Skoda Armament Works, originally purchased by a Czechoslovak citizen in Czechoslovakia through the head office of the bank there. Giving judgment for the defendants, Mr. Justice Cassels held Czechoslovak law to be the proper law of the contract and the Czech exchange control laws to be applicable in this country by virtue of Order No. 36, S.R.O., 1946, enforcing the Bretton Woods Agreement. Since, in the view of the judge, the London branch of the Prague bank was not a separate legal entity, the result was to make a transfer of the debentures from an 'exchange citizen' to an 'exchange foreigner', prohibited under Czech law, a legal impossibility in this country.

The interesting aspect of the Court of Appeal's judgment (reversing the decision of Mr. Justice Cassels) both in the instant case and from the point of view of the development of private international law in this country, was the marked tendency to regard the whole operation whereby the debentures were purchased and deposited for safe custody in London through a Czech bank in Czechoslovakia on behalf of a Czech citizen there resident at the time of purchase, as virtually two contracts, the one concerned

[1] For comment on this case see p. 685, *infra*.
[2] Reported in Vol 2, I.L.Q., pp. 96–8.

with the purchase the other with the deposit of the debentures; or if not as two contracts at least as two facets of one contractual operation, the proper law of the purchase being Czech law, and that of the custody English law.

This logical and sensible approach cuts through the confusion that has not infrequently been caused in the past by the tendency to assume that there can be only one proper law of an international contract. As the Lord Chief Justice frequently interjected during the hearing it would be a curious result if a person plainly entitled thereto should be unable to obtain possession of debentures by personal application at the bank where they had been deposited for safe custody ever since their purchase, especially since no financial transaction was involved, the claim being simply for possession of three ' pieces of paper '.

No reference was made during the hearing to the new Czechoslovak code of Private International Law,[3] which was not in evidence, being of so recent date. Leave to appeal to the House of Lords was granted, the bank undertaking to pay the plaintiff's costs in the House of Lords in any event.

TORT—THE PLACE OF TORT

Bata v. *Bata*, [1948] W.N. 366.

In this case the appellant claimed damages for libel and sought leave to serve the respondent out of the jurisdiction under R.S.C., Ord. 11, r. 1 (ee) which authorises the grant of leave in cases where the action is founded on a tort committed within the jurisdiction. The alleged libel arose out of a circular letter prepared in Switzerland and sent to persons resident in England. Leave was granted by a Master, but Jones, J., reversed this decision on the ground that the case did not come within Ord. 11, r. 1 (ee). The Court of Appeal (Scott and Wrottesley, L.JJ., and Wynn-Parry, J.) unanimously reversed Jones, J., holding that as copies of the letter had been received in England, the alleged libel was published there.

Counsel for the respondent relied on *George Monro, Ltd.* v. *American Cyanamid and Chemical Corporation*, [1944] 1 K.B. 432. There the plaintiff, an English company, bought rat poison in New York from the defendant, an American company, under a contract which provided that the governing law was to be New York law and that property was to pass in New York. An

[3] Vol. 2, I.L.Q., pp. 473–5.

English purchaser suffered injury through the defective condition of the rat poison and recovered against the plaintiff, who claimed against the defendant and sought leave to serve him out of the jurisdiction under Ord. 11, r. 1 (ee). The Court of Appeal unanimously refused leave. Scott, L.J., based his judgment entirely on the discretion vested in the court under Ord. 11. However, Goddard and du Parcq, L.JJ., specifically held that no tort was committed in England, even though damage was the gist of the action.

In *Bata* v. *Bata*, Scott, L.J., distinguished *Monro's Case* holding that it was ' irrelevant '. There it had been held that there was not sufficient evidence of negligent acts or defaults within the jurisdiction, whereas, in the instant case, publication was essential to constitute the tort of libel and had taken place in England. Therefore leave should be granted. Wrottesley, L.J., and Wynn-Parry, J., concurred.

The decision occasions some difficulty. In *Monro's Case*, the majority specifically decided the case on the tort point, holding that no tort was committed in England. Yet damage is essential to constitute the tort of negligence, just as publication is essential to libel. On this basis it seems difficult to reconcile the decisions, unless we are prepared to hold that cases of defamation fall within a special category. There seems to be little justification for such a distinction. A valid distinction between the cases can be made by reference to the discretionary character of the jurisdiction under Ord. 11, and Scott, L.J., based his judgment in *Monro* entirely on that point. But the difficulty arises from the fact that the majority in *Monro* decided the case on the tort point.

The judgments of Goddard and du Parcq, L.JJ., in *Monro's Case* have been subjected to strong criticism by Cheshire (*Private International Law*, 3rd ed., pp. 385–6). The learned author advocates the doctrine, supported by the balance of American authority, that a tort is committed in the country in which the last act or default necessary to constitute the tort occurs. Wolff (*Private International Law*, p. 502) prefers the view of Goddard and du Parcq, L.JJ., in *Monro's Case*, namely, that the tort is committed in the country in which the defendant acts, and he gives an example in defamation which is refuted by *Bata* v. *Bata*. Cook (*Logical and Legal Bases of the Conflict of Laws*, pp. 319, 345) prefers the doctrine that the plaintiff may choose among various systems of law. His view is that the tort may be said to be committed in any country in which the defendant acted (or defaulted) and in any country in which such acts or defaults took effect, and that the plaintiff may select from among these systems that

one which is most favourable to his claim. It is submitted that this is a reasonable view. But, unless we are prepared to make a special case of defamation—a course which has little merit—it is submitted that there is great difficulty in reconciling the decision of the majority in *Monro's Case* with *Bata* v. *Bata*.

FOREIGN JUDGMENTS—THE DEFENCE OF FRAUD

Syal v. *Heyward*, [1948] K.B. 443.[1]

The plaintiff obtained judgment in undefended proceedings in India for a sum of money, alleging that he had lent this sum to the defendants. The judgment was subsequently registered in England under the Foreign Judgments (Reciprocal Enforcement) Act, 1933, and the defendants applied to have the registration set aside on the grounds that it had been procured by fraud, in that the plaintiff had falsely and excessively stated the amount loaned, so as to conceal from the court the fact that the defendants might have a defence under the Indian usury laws. The Court of Appeal unanimously held that the defendants were entitled to a trial on the issue of fraud. The plaintiff had argued that it had been open to the defendants to raise this defence in the original proceedings, and failure to do this debarred them from raising the plea, except in respect of matters material to the plea of fraud which had been discovered subsequent to judgment. The court rejected this argument and laid down in the most general terms that nothing ought to persuade an English court to enforce a judgment obtained by fraud.

Syal v. *Heyward*, therefore, extends the doctrine enunciated in *Abouloff* v. *Oppenheimer* (1882), 10 Q.B.D. 295, and *Vadala* v. *Lawes* (1890), 25 Q.B.D. 310, that on a defence of fraud, the court is entitled to reopen the case even to the extent of going into the very facts investigated in the original hearing. *Syal* v. *Heyward* is an extension of this doctrine, because it lays down that on a plea of fraud the court may consider matters which it was open to the party, who is the defendant in the action on the foreign judgment, to raise in the original proceedings, but which he did not raise. The doctrine of *Vadala* v. *Lawes* has been criticised by learned writers on Private International Law (see Cheshire, *Private International Law* (3rd ed.), pp. 814–6; Read, *Recognition and Enforcement of Foreign Judgments* (1938), pp. 275 *et seq.*), and Canadian courts have in some instances refused to follow it. However, the Court of Appeal in *Syal* v. *Heyward* has not only followed *Vadala* v. *Lawes*, but extended its operation. With respect, it may be

[1] Reported at p. 678, *supra*

doubted whether the decision produces a desirable result. If a person for some reason does not wish to disclose a defence in the original proceedings, the present doctrine, enunciated by the Court of Appeal, permits him to raise the defence in aid of a plea of fraud in an action brought in England on the foreign judgment. Whether the doctrine of *Vadala* v. *Lawes* has any merit (which may be doubted), it is submitted that the present extension of that doctrine is regrettable.

REVIEW OF CASES

CANADA

Levko v. *Levko* [1948] 1 D.L.R. 61

(Ontario Supreme Court)

This was an undefended action for divorce in which the main issue was the domicile of the defendant husband. The plaintiff and male defendant were married in 1926 in a part of Czecho-Slovakia now 'ceded' to Russia. He, a cement finisher, came to Montreal, in the province of Quebec, in 1927; she followed in 1928. They lived together there until 1930 when the husband deserted. His whereabouts for the next ten to twelve years were unknown. He was at the time of action, and had been for roughly six years, resident in the city of Windsor in the province of Ontario. With the help, financial and labour, of his co-defendant he built a house in that city in which he was still living with his co-defendant. The plaintiff could produce no further evidence of the husband's domicile. The case came before Urquhart, J., who thought it probable that the spouses abandoned their domicile of origin and obtained a domicile of choice in Quebec, especially after the plaintiff joined her husband there in 1928. Thereafter the problem was whether there was a change to Ontario. 'The chief matter to be considered is the conduct of the party rather than his expressions of intention'. This included the circumstances under which he left the last domicile and the length of residence in the alleged new domicile. His lordship, in applying these rules to the facts of the case, found with some hesitation a present domicile of choice in Ontario, and was therefore enabled to grant the plaintiff judgment nisi for divorce.

Spencer v. *Ladd*, *Finlay* v. *Boettner*, [1948] 1 D.L.R. 39

(Alberta Supreme Court)

These were two nullity actions in each of which the plaintiff sought a declaration of annulment on the ground that the defendant

in each case had a living wife at the time of his marriage to the plaintiff. The particular proceedings here reported were an application in each action for an order for service on a defendant out of the jurisdiction, which proceedings were heard before Boyd McBride, J. His Lordship's sole difficulty was jurisdiction of the Alberta Court to hear the actions. The defendants were not represented, but counsel appeared as amicus curiæ, on behalf of the provincial Attorney-General and the King's Proctor. In the *Spencer Case*, the plaintiff while domiciled in Alberta married Ladd there in 1946. His present domicile was uncertain, he being then in gaol in Saskatchewan, and having previously lived in British Columbia (where he married in 1938) and in various States of the U.S.A. This first wife was still living. In the *Finlay Case*, the plaintiff was born, domiciled, and resident in Alberta. While on active service she married Boettner in the State of Washington, U.S.A., in 1944. Boettner was previously married and his first wife was still living. His domicile was probably in the State of Pennsylvania, U.S.A. He had not resided in Alberta.

In the *Spencer Case*, his Lordship had no doubts as to jurisdiction. The marriage had taken place within the jurisdiction and there was no question as to a voidable marriage such as arose in *De Reneville* v. *De Reneville*, [1947] 2 All E.R. 112 (trial judgment).

In the *Finlay Case*, none of the three bases of jurisdiction set out in Dicey's Rule 65 existed. And his Lordship added that ' Canadian courts have tended to apply the three classifications of Dicey's Rule 65 as stating *exclusively* the possible grounds of jurisdiction ', citing Falconbridge, *Essays on the Conflict of Laws*, 1947, at p. 628, in contrast with the apparent inclination of English courts ' to extend ' their jurisdiction ' in undefended annulment cases '. His Lordship notes two clear-cut lines of authorities. In the first, jurisdiction is founded on the view that the Ecclesiastical Courts always possessed it, that jurisdiction is inherent in the Superior Courts, ' and that it is just and also in the public interest that a woman who is domiciled—or perhaps is bona fide resident—in the jurisdiction should have her status as a single or married woman judicially established by the court of that jurisdiction and should not have to proceed abroad for the purpose of obtaining a decision as to whether she is lawfully married or unmarried under the law applicable in that jurisdiction '. In support of this view counsel had cited *White* v. *White*, [1937] P. 111; and the cases which flowed from it. Against this view was the line of cases denying jurisdiction based solely on the plaintiff's residence: *Gagen* v.

Gagen, [1929] N.Z.L.R. 177; *Hutchings* v. *Hutchings*, [1930] 4 D.L.R. 673 (Manitoba), and cases subsequent thereto. His Lordship said he was able to find narrow grounds of fact on which most of the decisions in this line of authorities could be distinguished from the *Finlay Case* (*e.g.*, plaintiff in *Gagen Case* did not come with clean hands; action based on impotency, not bigamy, etc.). His Lordship, however, preferred not to base his judgment on these distinctions but simply refused to follow them. He preferred the view of Sir William Scott in *Pertreis* v. *Tondear* (1790), 1 Hag.Con. 136 at p. 138, to the effect that a person bona fide resident in England should be able to have it determined by an English court whether he or she is married under English law, whether or not such decree would be effective outside the jurisdiction in which it was made. Further, hardship or special circumstances may properly be taken into consideration: *De Reneville* v. *De Reneville*, *supra*. Here the plaintiff is barred from obtaining a marriage licence in the province in which she has always lived (apart from her service with the forces). His lordship could not bring himself to think that the comprehensive and widely based jurisdiction of the Ecclesiastical Courts from which the Alberta court derived its jurisdiction could be 'arbitrarily controlled or restricted simply because of or by a threefold classification of even so eminent a writer as Professor Dicey, something which Dicey himself when he formulated Rule 65 does not seem to have intended and against which he appears to have safeguarded himself in his comment on it. That rule, in my view, is not, and was not, intended to be exclusive'. 'The doctrine of domicile is of comparatively recent origin and growth'. His lordship held that as the marriage was void ab initio, and as the plaintiff was domiciled in Alberta (holding that she never acquired Boettner's domicile), she had a substantive right to a declaratory judgment, that the Alberta court was bound to entertain proceedings to make that right operative, and that the court had jurisdiction. This was not an 'extension' of jurisdiction, but an exercise of inherent jurisdiction possessed by the court.

Gower v. *Starrett*, [1948] 2 D.L.R. 853

(British Columbia Supreme Court)

In this case the facts were similar to the *Spencer Case* above, and Farris, C.J.S.C., could simply have granted the decree on the basis of marriage within the jurisdiction. However, his Lordship discussed in full the bases of jurisdiction in nullity actions, in B. C. and laid down two rules which he stated were concurred in

unanimously by his brother judges and 'express the law as they will apply it in like cases until such time as the law is otherwise cited by a court whose judgment is binding on this court'. These rules were (a) that there is no difference in the bases of jurisdiction in nullity petitions whether the marriage be void ab initio or voidable, and (b) that these bases were exclusively the threefold rules of Dicey's Rule 65: domicile or residence of the *respondent* within the jurisdiction or marriage within the jurisdiction. On the third basis (marriage within the jurisdiction) a decree in the case before his Lordship was granted and the petitioner's residence within the jurisdiction added nothing to the court's jurisdiction. Residence of the petitioner, without more, was not enough. So too, the alleged 'attornment' of the respondent by appearing to the petition and being represented by counsel in court at the hearing added nothing to his Lordship's jurisdiction. For his two rules, Farris, C.J.S.C., purported to follow extensive obiter of his provincial Court of Appeal in *Shaw* v. *Shaw*, [1946] 1 D.L.R. 168, and refused to follow the Alberta decision noted above.

[Note: None of these three cases raises the issue as to what is the proper law applicable once jurisdiction is established: cf. *Robert* v. *Robert*, [1947] 2 All E.R. 22 (not overruled on this point), and *De Reneville* v. *De Reneville* in the Court of Appeal: [1948] 1 All E.R. 56. What, in other words, would be the proper law if the court had jurisdiction based, for example, on residence of the respondent who was domiciled in China where polygamy was lawful and who had married the petitioner (a) in China, (b) in England?]

Lim v. *Lim*, [1948] 2 D.L.R. 353

(British Columbia Supreme Court)

This was a determination of a point of law in an action for alimony. The admitted facts were briefly that the plaintiff and defendant while citizens of and domiciled in China married in 1919 and by the law of China the plaintiff acquired the civil status of wife of the defendant. The defendant had married in 1912 and his first wife was still living in China. Polygamy was recognised by the law of China, each wife having the same status. The plaintiff and defendant were admitted to Canada in 1919 as husband and wife and were domiciled in British Columbia from 1924. The sole question at this point in the proceedings was whether the marriage in 1919 would be recognised in this Canadian province as a valid marriage. Coady, J., looked to *Hyde* v. *Hyde* (1866), L.R.

1 P.D. 130, where in refusing to recognise a potentially polygamous marriage in Utah, the court said of the parties: 'as between each other they are not entitled to the remedies, the adjudication, or the relief of the matrimonial law of England'. His Lordship noted that in this action the wife was invoking the court's jurisdiction to assert her domestic rights under our law. It was true that for other purposes, *e.g.*, legitimacy or succession, a different rule might prevail: *Yew* v. *Att.-Gen. for British Columbia*, [1924] 1 D.L.R. 1166 (B.C.C.A.). But his Lordship felt bound by the Hyde decision which seemed to be a basic decision and there was no case to suggest that it had not been consistently recognised by English courts. Statements to the contrary in the *Yew Case* in his own provincial court of appeal were merely obiter.

His Lordship expressed much dissatisfaction with the law which recognised the status of wife in the plaintiff for some purposes only, but said that the position, which is not consistent with common sense and was so repellent to one's sense of justice, was understandable only on the basis of *Hyde* v. *Hyde*. In his own words, his Lordship refused 'to blaze a new trail', but hoped the case would go to a higher court.

Two weeks later, his Lordship added a further note in view of the fact that certain recent English nullity actions involving Hindu marriages had been brought to his attention. Coady, J., mentions two of them and distinguishes them on the ground that each related 'to a nullity action brought in England by an English woman who went through a ceremony of marriage in England with a Hindu who had been previously married to a Hindu woman in India and whose marriage with her was still subsisting'. The decree of nullity in each case was granted: *Srini Vasan* v. *Srini Vasan*, [1946] P. 67; *Baindail* v. *Baindail* (1946), 62 T.L.R. 263. The B. C. action was accordingly dismissed.

[Note: (a) The last distinction seems hard to follow: the petitioner in each of the two English cases invoked the matrimonial machinery of England. True, it was in relation to an English marriage. But in so invoking that machinery in relation to that marriage, the court had to and did adjudicate upon the validity of the earlier polygamous marriage, which latter marriage was held valid. (b) Coady, J., makes no mention of the third of these cases in which the matrimonial machinery of England was invoked with respect to the marriage in India: *Mehta* v. *Mehta*, [1945] 2 All E.R. 690. (c) It is questionable whether *Hyde* v. *Hyde* is binding on any British Columbia court.]

Fitzgerald v. *Minister of National Revenue*, [1948] 1 D.L.R. 824
(Exchequer Court of Canada)

The facts of this case, much simplified, were that the Federal Succession Duty Act which came into force in June, 1941, levied duty upon, inter alia, property situated in Canada of persons dying domiciled out of Canada. A. W. died in 1924 domiciled in Canada leaving charged upon his estate, chief asset of which was hotel property in Canada, a legacy of $150,000 or one-half his estate, whichever was greater, to his widow, K. W., who died in 1924 domiciled in Canada leaving her whole estate to her sister, B. S. The sister died in January, 1941, domiciled in California leaving her property to her husband, G. S., who died in August, 1944, domiciled in California, leaving his whole estate to J. K. R., who died in December, 1944, domiciled in California. In 1945 the hotel property which previously had been of insufficient value was sold for a sum sufficient to pay the legacy and accrued interest. This sum was paid into a bank in Vancouver, Canada, where it remained pending disposition of this appeal by the administrator of the estates of G. S. and J. K. R. against an assessment of duty in respect of these moneys on the basis of a succession to property situated in Canada of persons dying domiciled out of Canada. The tax accrued at the death of G. S. whose chief asset was his interest in the estate of his wife, whose chief asset went back to these moneys. The fact that subsequently to the death of G. S., an asset in the estate of A. W. was realised did not affect the character and local situation of the assets in the G. S. estate. In fact, at G. S.'s death the value of this interest in his wife's estate was not determinable because the hotel had not been sold and it was unknown whether the legacy charged on it could be paid in full. The question then was, in the words of O'Connor, J.: 'What was the claim of [G. S.] in the estate of [B. S.] and is the situs of that claim British Columbia or California'. His Lordship held that the rule whereby the property in a legacy vests upon the assent of the executor to a specific legacy in the legatee as of the date of death did not apply here. G. S. could not claim the assets in the A. W. estate in specie, or even the moneys in the bank. His claim was for property which was a chose in action and the situs of that chose in action was where it could be enforced. *Re Ewing* (1881), 6 P.D. 19; approved in *Sudeley* v. *Att.-Gen.*, [1897] A.C. 11. That chose in action is a right to take proceedings, in the jurisdiction where his wife died domiciled, to have her estate administered notwithstanding that some assets in her estate (the chief assets) might

be situate out of that jurisdiction. Both B. S. and G. S. died domiciled in California and both estates were being administered in California. [An ancillary grant in the B. S. estate had been made in Canada.] The personal representatives of the B. S. estate could only be sued in the California courts. The chose in action was a California chose in action: a California asset, not a Canadian asset. It was therefore not property in Canada. It was argued that administration of the G. S. and J. K. R. estates must be taken out in Canada, so that discharges could be given to Canadian administrators of the estates of B. S. and G. S. and J. K. R. O'Connor, J., did not agree. Appointment of ancillary administrators would not change the rights. Their only claim would be to have the preceding estate administered and it was in California. Further such ancillary administrators were not necessary. The ancillary administrator of the B. S. estate 'may safely, and in fact, be compelled to transmit the residue to the domiciliary administrator': *Eames* v. *Hacon* (1881), 10 Ch.D. 347, at p. 352. The appeals were allowed.

Harvey et al. v. *M. V.* '*Terry*', [1948] 1 D.L.R. 728

(Exchequer Court of Canada: British Columbia Admiralty District)

The chief interest in this case was what law applied to the various claims in rem against *The M. V.* '*Terry*' which foundered off the Canadian coast while on a voyage from Seattle, Washington, to Alaska, and was towed to a Canadian port. The vessel was owned and registered in Seattle, but after its disaster its owner apparently abandoned it. The master, crew, repairers and mortgagee each claimed against the vessel for sums totalling more than it was now worth. Sidney Smith, D.J.A., held (a) that a master's and crew's lien for wages should be determined by the lex loci contractus (Washington) which gave a lien to the crew, but none to the master, notwithstanding that the latter had such a lien by the lex fori (Canada); (b) that a master's claim for reimbursement for necessary expenses was governed by the lex loci contractus (Canada) which gave a lien; (c) that the priority as between these claims and those of the intervenors (the repairers and mortgagee) should be determined by the lex fori.

[Contributed by Mr. G. D. Kennedy of the University of British Columbia.]

UNITED STATES OF AMERICA

UNITED STATES SUPREME COURT

Mr. Justice Colden

Kraus v. *Banka* [1]

64 N.Y. Supplement Second Series

In 1938 and 1939 and prior to March 15, 1939, the plaintiff deposited in Prague with the defendant, a banking corporation organised and doing business in the Republic of Czechoslovakia, an aggregate of 319,647.10 Czechoslovakian crowns, as well as certain securities. These funds and securities were deposited under contracts of deposit, the terms of which were acknowledged by the plaintiff as known to and binding upon him.

On March 15, 1939, Czechoslovakia was invaded by Germany; a separate puppet State of Slovakia was set up, certain parts of the Republic were ceded and the remaining portion was set up as the German Protectorate of Bohemia and Moravia. At that time the plaintiff was a non-resident of Czechoslovakia.

In September, 1940, the plaintiff instituted this action for moneys had and received and to recover the value of the securities. Jurisdiction was obtained by attaching the defendant's fund in New York. The defendant, in its answer, merely denied those portions of the amended complaint which concerned the effect of the Nazi occupation. It has admitted receiving plaintiff's funds and securities and the value thereof in dollars, and that it has failed to pay the plaintiff any part of his funds or to deliver to him any part of his securities or the value thereof. Two affirmative defences have been asserted. The first concerns the funds which are sought to be recovered in the plaintiff's first cause of action, and the second concerns the securities which are sought to be recovered by the plaintiff in his second cause of action. In the first defence it is alleged that the contracts, pursuant to which plaintiff deposited the funds with the defendants, were made in the City of Prague, and were there to be performed, that the laws in force at the time of the making of such contracts of deposit, and at all times thereafter, provided and still provide that a resident of Czechoslovakia is prohibited from making any payment to a non-resident of the said country without a permit of the Foreign Exchange Control authorities, that the defendant is a resident of Czechoslovakia within the

[1] This decision was referred to in Vol. 2, I.L.Q., p. 97, in the report of *Frankmann* v. *Anglo-Prague Credit Bank*.

meaning of said laws, and the plaintiff and his assignors are non-residents and no permit has been granted by the Foreign Exchange Control authorities to the defendant for any payment to the plaintiff or his assignors of any of the funds in question. The second defence is similar to the first, with the exception that it has reference to the transmittal of securities abroad.

The plaintiff has now moved for partial summary judgment in respect to the first cause of action pleaded in the amended complaint and severing the action so as to permit him to proceed to trial upon the second cause of action. The defendant has cross-moved for summary judgment in its favour on both the first and second causes of action pleaded in the amended complaint. In view of the cross-motion, plaintiff has requested summary judgment as to both causes of action pursuant to sub-division 8 Rule 113 R.C.P.

Stripped of all superfluous matter, these motions present a question of law only. Both sides claim that they are entitled to summary judgment and no material issue of fact is presented so as to prevent a summary disposition.

It appears upon the record herein that for many years prior to the plaintiff's deposit of his funds and securities with the defendant, Czechoslovakia enacted laws regulating its foreign exchange and prohibiting payment to non-residents or payments abroad without the consent of its Foreign Exchange Control authorities. Such laws were in effect at the time that the plaintiff entered into the contracts in question with the defendant and are still in effect. In said contracts plaintiff agreed to be bound by the general terms of the bank, which were annexed thereto. Of particular significance is the following: '23. The place of performance and the place of payment for all engagements ensuing from business connections with us is the place of that office of our institution which has transacted the relative business with the customer, provided, of course, there is no other special arrangement. The bank is discharged from its pecuniary and any other obligation, as soon as it has given its fulfilment at the disposal of the customer in its offices and during its official hours. Unless we receive other instructions, we send cheques, bills of exchange drafts, deposit books and documents of all kinds including insurance policies and documents covering goods in registered uninsured letters at the expense and risk of the ordering party. We send monies and securities (bonds, stocks) at our discretion, either indicating their full value or having them covered by insurance, and this in all cases at the expense and risk of the ordering party. In the event of contests, if any, both

parties submit to the jurisdiction of the Court of Justice materially competent according to the place of that office of our institution which has transacted the respective business with the customer, while the bank continues to have the right to institute an eventual action at the customer's common Court of Justice '.

Thus, the defendant's office in the City of Prague, Czechoslovakia, is the place of performance and the place of payment agreed to by the parties themselves, and the liability, if any, flowing from the said contracts is to be determined under the laws of Czechoslovakia. The fact that Czechoslovakia was under German occupation at the time this action was commenced, does not give the plaintiff any different or additional rights. The status of the deposits has remained unchanged and the prohibition against payments abroad, which existed continuously, still exists.

It is unnecessary to determine the validity of the laws decreed by the German invader. These decrees did not alter the existing exchange restrictions. If they were valid, plaintiff could collect the money only in Czechoslovakia; if they were invalid, the existing law of Czechoslovakia continued in full force and effect. Moreover, No. 21 of the general terms of the bank to which plaintiff agreed, provides as follows : ' If on account of events of vis major, war or strike of the staff, the bank would be compelled to stop entirely or partly the carrying on of its business activity the bank is released for that period and for so long until the bank has again been brought into the normal course of activity from the fulfilment of its liabilities (obligations) and is not responsible for any damage which might arise from such suspension of its activities '.

Just as the plaintiff was prevented by the events in Czechoslovakia from going there for the purpose of collecting the funds and securities due to him, so was the defendant prevented by the invader from carrying out those normal activities, by the events which are now history and which were contemplated by the parties in the aforesaid paragraph 21.

In passing, it may be stated that foreign exchange control to regulate the international flow of capital has been almost universally adopted in the present emergent period of history. The United Nations Monetary and Financial Conference held at Bretton Woods, New Hampshire, in July, 1944, to which both the United States and Czechoslovakia were parties, recognised the necessity for foreign exchange control to regulate the international flow of capital and provided for recognition of such controls (see Article VI, Section 1, sub-division (*a*); section 3, Article VIII, section 2, sub-division (*b*), and Article XIV, section 2).

It follows that under the terms of the deposit contracts signed by the plaintiff and the exchange control laws of the Republic of Czechoslovakia then in force, the complaint fails to state any cause of action in favour of the plaintiff and, accordingly, his motion for summary judgment must be denied, and the cross-motion of the defendant for summary judgment granted in all respects.

Settle order on notice.

Ludecke v. *Watkins*

92 U.S., Adv. Opinions 1344. Decided June 21, 1948

Mr. Justice Frankfurter delivered the opinion of the court on a writ of certiorari to the United States Circuit Court for the Second Court to review a judgment affirming a judgment of the District Court of the United States for the Southern District of New York, denying a writ of habeas corpus for release from detention under an order of the Attorney-General directing the petitioner's removal from the country as a dangerous alien enemy.

Petitioner, Ludecke, a German alien enemy, was arrested on December 8, 1941, and, after proceedings before an Alien Enemy Hearing Board on January 16, 1942, was interned by order of the Attorney-General, dated February 9, 1942. Under the Act of 1798 (Act of July 6, 1798, 1 Stat. 577, c. 66, Rev. Stat. s. 4067, as amended (April 16, 1918) 40 Stat. 531, c. 55, 50 USCA s. 21, 11 FCA tit. 50, s. 21), the President on July 14, 1945, directed the removal from the United States of all alien enemies ' who shall be deemed dangerous to the public peace and safety of the United States '.

The statute, in force for a hundred and fifty years, committed certain powers to the President. He is empowered in time of declared war to proclaim, as he publicly proclaims, that all nationals of the hostile Power within the United States may be apprehended, restrained, secured and removed as alien enemies.

The claims that brought the case to the court are :

1. the question whether the dangerous character of the petitioner is subject to judicial review, and
2. the question of continuation of Word War II after the cessation of hostilities.

The court cites Congressional recognition in the recent Administrative Procedure Act that some statutes ' preclude judicial review '. It then places the Alien Enemy Act of 1798 in this category by virtue of its terms, purpose and construction. In support of its

position the court cites controlling contemporaneous construction. It also draws support from Marshall, C.J., and Mr. Justice Iredell shortly after the Act was passed. It is asserted that the Act would be viewed the same way without the impressive gloss of history.

In respect to the second question, the court held that the war did survive the cessation of actual hostilities. It is pointed out that to hold otherwise would largely nullify the power to deport aliens, for this is scarcely practicable during the pendency of a shooting war. The termination of the war is a political act whether it is done by treaty, legislation or proclamation. The court would be trenching upon the political agencies of the Government to follow the suggestion that the unconditional surrender of Germany and the disintegration of the Nazi Reich have left Germany without capacity to negotiate a treaty of peace. Furthermore, it is not for the court to question the belief of the President that enemy aliens dangerous to the country during actual hostilities do not lose their potency for mischief during the confusion and conflict characteristic of a state of war when the guns are silent ' but the peace of Peace has not come '.

Finally, the court refuses to read the statutory phrase ' declared war ' to mean ' actual hostilities '. It also states that if the war in fact has not ended, so as to justify local rent control, a fortiori it validly supports the Presidential power in relation to enemy aliens under the 1798 Act. It is not clear just how the court derives much support from this consideration. The court then falls back on the historical ground and lapses into its former flair for fine phrasing so characteristic of law school days with this unique passage :

> ' The Act is almost as old as the Constitution, and it would savour of doctrinaire audacity now to find the statute offensive to some emanation of the Bill of Rights '.

Judgment affirmed and stay order entered February 2, 1948, vacated.

Justices Black, Douglas, Murphy and Rutledge joined in a dissent.

Black, J., with concurrence of Murphy, Douglas and Rutledge, JJ., dissented on the ground that, as regards deportability of alien enemies the war should be considered as terminated. Douglas J., with the concurrence of Murphy and Rutledge, JJ., dissented on the ground that, for purposes of review on habeas corpus, the deportation of an alien enemy is no different than any other deportation proceeding, and is subject to the same due process requirements of reasonable notice and fair hearing, absence of which calls for judicial relief.

CALIFORNIA SUPREME COURT

Extradition

Coumas v. *Superior Court of San Joaquin County*

April 23, 1948, Speace, J.

(Digested in 16 U.S. Law Week 2550, May 18, 1948)

Petitioner, Coumas, a Greek national, became a naturalised citizen of the United States. In 1932 he fled to Greece to avoid arrest for crimes committed by him in California. The Greek Government denied extradition on the ground that he had never divested himself of Greek nationality. It also asserted that under its extradition treaty with the United States neither country was bound to deliver up its own nationals. Petitioner was tried and convicted by a Greek court under local laws providing for trial of Greek nationals for crimes committed abroad and punishment as if committed in Greece. He served consecutive terms of imprisonment for the respective crimes.

On return to California, petitioner was arrested and held for trial on the original charges against him. He then sought a writ of prohibition restraining respondent court from proceeding with trial on ground that it was forbidden by section 793 of the California Penal Code. The Code provides that :

> ' when an act charged as a public offence is within the jurisdiction of another State or country, as well as of this State, a conviction or acquittal thereof in the former is a bar to the prosecution or indictment therefor in this State '.

The court recognised Greece's determination that petitioner was a Greek national. It stated that a provision in an extradition treaty with Greece that :

> ' the State appealed to shall decide whether the person claimed is its own citizen '

effectively countervailed any argument that would permit disregard of Greek law under which petitioner might still be deemed its citizen.

The court held that Greece had jurisdiction of petitioner under its qualified expatriation laws because it had never consented to his expatriation ; that it also had jurisdiction of the offences by its penal law, and hence that conviction by a Greek court barred subsequent trial for same offences in California.

The claim that petitioner's trial and conviction in Greece were collusive was rejected on the facts.

BOOK REVIEWS

Le droit international privé. Ses bases, ses normes et ses méthodes. By PIERRE LEPAULLE. [Paris : Librairie Dalloz. 1948. 261 pp.]

M. LEPAULLE, well known for his remarkable book on Trusts, has now presented us with a work on Private International Law. This work is not a textbook on the subject, as the title might suggest. It certainly deals with the '*normes*' of private international law as well as with its '*bases*' and its methods, but by *normes* the author does not mean the particular rules applicable to the various problems of Private International Law. He limits himself to the general principles of conflict rules and only mentions particular rules by way of example.

In an impressive introduction he describes the unsatisfactory state of existing Private International Law in France and elsewhere. He regards it as poor and vague, paralysed by nationalism. The practice of the courts is often directed by judges who are not well acquainted with problems of Private International Law, or have no access to foreign legal literature, or who, owing to 'provincialism, ignorance, chauvinism, caution, or laziness', apply their own municipal law as far as possible. The most important factor in developing that part of the law is legal theory ('*la doctrine*'), which, however, often contents itself with purely national solutions. M. Lepaulle hopes that it will be possible to 'assemble all men of good will', prepared to study foreign methods and solutions, to discover and fix common doctrines and tendencies, and to draft international agreements.

In the *first part* of his book the author's object is to eliminate the 'great theoretical controversies' on the basic principles of conflict of laws.

He starts by denying any connection between conflict of laws and the concept of *sovereignty*. There are still some Continental writers who regard the conflict of laws as a conflict of sovereignties. In this country there is no need to refute an error of this kind; it is sufficient to refer to the peaceful contrast between Scottish and English law. The concept of law as the 'will of a sovereign' has many adherents on the Continent; the author rejects it rightly. But when he replaces it by the 'mass of social phenomena governed by rules which sociology has not yet fixed' (p. 35) he is using a vague phrase which does not even do justice to sociology; moreover, there is no contrast between the 'will of a sovereign' and 'social phenomena', since the will of a sovereign is itself a social phenomenon.

The author is certainly right in adopting the view (of many lawyers) that the law in force in a given State is for that State nothing but a 'technical instrument', that no State has any particular interest in the wide application of its law, that the non-recognition of foreign judgments never implies an attack on foreign sovereignty, and that the handling of the rules on conflict of laws never constitutes a diplomatic incident. The application or refusal of *renvoi*, the doctrines of classification, are absolutely independent of sovereignty (p. 41).

Two other 'fundamental' problems have been justly eliminated by the author, who shows their complete irrelevance. The first concerns the question whether the conflict rules belong to private or to public law; the second the nature of foreign law if applied by the forum: is it still law, or is it a 'fact'? and if law, is it still the law of a foreign country, or does it become the law of the forum through incorporation by the latter's sovereign? All such problems are not worth considering; they result in mere terminological discussions.

The old controversy: 'Universalism' or 'Nationalism' has become pointless because every legal system contains conflict rules of a merely national character and others common to many or all nations. 'What in the epoch of Pillet was a battlefield has become a desolate plane of drifting memories'.

The same is true of the old controversy: 'Personalism' or 'Territorialism'? M. Lepaulle rightly refuses to see in this a difference of 'dogmas'; it is a difference in mental attitude (*état d'esprit*). He gives a telling description of the various types. Among personalists he finds two types: the imperialist by temperament, belonging to a people which sends its men abroad and dreams that the mother-country will maintain control over them; and the idealist, for whom the individual, not the nation, is the supreme reality, for whom frontiers are of secondary importance beside the moral and intellectual union of men of the same people scattered over the world (p. 80). The term 'territoriality' is ambiguous. It refers to the place where the court sits, and the 'territorialist' wants the lex fori applied to the greatest possible extent because he fears the errors so apt to be made in applying foreign law. In a second sense territoriality refers to the 'place where the acts creating legal rights are performed' (p. 77): territorialism in this sense may spring from very varied *états d'esprit*; the author mentions persons who see in the law first and foremost the 'coercive power', the public authority enforcing the law, and who are blind to the usual extra-judicial working of the law. A different type is the politician who wishes to defend his country against a rising flood of immigrants and of foreign legal institutions. The latter opinion in particular, in so far as it puts foreign law and imported foreign commodities on the same footing—a view recently adopted by M. Niboyet—seems almost fantastic.

In the *second part* the author develops his positive method of elaboration and application of conflict rules. The relationship between the ordinary conflict rules and the concept of *ordre public* is described thus : the ordinary conflict rules are less rigid than rules of municipal law and allow the judge greater latitude. If their application would, in his opinion, run counter to ' general interests ' which should be protected by justice as conceived in the forum it would be his duty to reject the ordinary conflict rule. It is obvious that such description of *ordre public*, though correct for French law, would go beyond the confines of English law. It may also be doubted whether the discretion of the courts (at least in England or Germany) is greater in respect of conflict rules than of municipal rules. The author further requires the judge to use his discretion ' in an international spirit ' and to understand foreign laws from the foreign point of view without reducing them to the categories of his own law, and thus to avoid the mistake of ' regarding his country as the centre of international life '.

As to the structure of any conflict rule, the author correctly distinguishes between the ' *notion rattachée* ' (*i.e.*, the subject-matter, or *substratum* connected with a certain municipal law) and the ' *point de rattachement* ' (*i.e.*, the ' point of contact ', the ' connecting point '). If, for example, the conflict rule runs: ' succession is governed by the law of the deceased's last domicile ' the question whether it is really a case of ' succession ' is concerned with a *notion rattachée*, while the last domicile is the point of contact. Whether a given factual relationship is considered as belonging, *e.g.*, to the group ' succession ' or to ' matrimonial property ' or to any other *notion rattachée*, is a question of classification. The author deals with this question at various points of his book (pp. 120, 153). He rejects all the established doctrines: Kahn's *lex fori* doctrine as well as Despagnet's *lex causae* theory, and Rabel's comparative law theory. Though agreeing with Rabel that the *notions rattachées* should be international in character he replaces Rabel's doctrine by a ' sociological ' doctrine. They are—he says, p. 129—connected with ' juridical sociology ' and not with comparative law. The reviewer doubts whether such an elastic term can become an effective tool. Even the author's other formula (p. 130)—vague as it is—is more helpful; it runs : ' The determination of the content of a *notion rattachée* is a question of common sense '. (See also p. 157 : choice of the ' best ' [?] law.)

The point of contact may be purely factual, such as the *situs* of a corporeal thing, or it may contain juridical elements; *e.g.*, the place of contracting *inter absentes*, or the domicile. It is then the forum which determines the juridical element. The author regards this as inconvenient, but so far it has never proved harmful. It might be preferable to replace all juridical points of contact by merely factual data, *e.g.*, replace the legal notion ' domicile ' by the factual notion ' domestic home '; but this, too, the author

rejects. Or again, an attempt may be made to 'internationalise' the points of contact by creating international concepts (of domicile, etc.). The author recommends this in the very optimistic hope that an understanding might be reached at an international conference. Finally, as to domicile, it has been proposed by German writers that this concept should be interpreted not according to the law of the forum but to that of the country in which the putative domicile lies : a man who under English law is domiciled in Germany but under German and French law is domiciled in France would then be treated by the English court as domiciled in France. M. Lepaulle believes this solution to be 'logical', in conformity with a case of doubtful nationality, where each State decides whether the *propositus* is or is not a national of that State. But an argument *e contrario* is just as 'logical' as a reasoning by way of analogy.

The author then examines the influence of a change in the applicable conflict rule (p. 160). He puts the following case (slightly corrected) : Two nationals of State x marry in Brussels in 1910; according to the law of x there exists an impediment which invalidates the marriage, while under Belgian law no impediment exists. The conflict rule of the forum f declares the law of x applicable as the national law of the parties : since 1940 the conflict rule of f no longer refers to the national law but to the law of the place of celebration. According to M. Lepaulle the marriage, which was void from 1910 till 1940 became valid (in f) in 1940, the validation having retroactive effect to 1910. He reasons that the interest of those who allege that they have acquired a 'right' (?) to rely on the nullity of marriage is less worthy of protection than the interest of those who might profit from its validity. But there is no reason to treat the case differently from similar cases where no conflict rule arises : if *e.g.*, a domiciled Englishman married his deceased wife's sister before 1907 the abolition of the 'impediment' in 1907 undoubtedly did not validate the marriage.

The ensuing chapter deals with the application of foreign conflict rules, and, therefore, with *renvoi*, *ordre public*, and the classification of foreign rules. As to the last point the author gives an example. An American widow demands a dower; the forum f classes the dower as a right of succession and would, therefore, apply the law of x as *lex domicilii defuncti*; the law of x ranges the dower among matrimonial property rights and therefore subjects it to the law of v, as *lex loci celebrationis* : according to the author the judge at f is to apply the law of v. How does this reasoning conform to the author's idea that classification should be made on the basis of a comparative estimate of the various 'social interests'? (The example is, for that matter, unfortunate. The dower, being an immovable, is governed everywhere by the *lex situs fundi*.)

The author does not say much about the 'incidental' or 'preliminary' question. He deals with it twice, first (rather vaguely)

on p. 150, and again on p. 200, where he makes his meaning clearer. He apparently adheres to the prevailing doctrine, according to which the judge normally answers an incidental question by applying the conflict rule applicable to the main question, and he admits that in some cases the conflict rule of the *lex fori* ought to be applied. But he does not say in which cases. He shelves the whole problem with a smile (p. 201 [1]), consoling us with the statement that the decision must be ' dictated by common sense '.

In regard to the requisite proof of the applicable foreign law the author states that ' in all countries ' foreign law is considered as a fact. In so far as German or Austrian law is concerned this is not correct : foreign law is treated in exactly the same way as customary law ; the court is bound to ascertain it and may avail itself of the assistance of the parties. If the proof of the content of foreign law does not succeed, M. Lepaulle thinks the action should be dismissed. It is difficult to see any reason for this unsatisfactory conclusion.

The last chapter deals with the cases in which the normal conflict rule must be set aside. There are three cases. First : where it is impossible to apply the conflict rule, notably where the foreign law demands the intervention of an administrative or judicial authority which does not exist or is not authorised to act under the law of the forum (p. 218). Secondly : the exclusion of the conflict rule on the ground of *ordre public*. The author repeats and expands what he has said, pp. 93, 184. It is in keeping with his general views that he hopes for greater restriction in applying the notion of *ordre public* than that existing in France : more tolerance is necessary. *On se comprend mieux, on s'étonne moins* (p. 236). Thirdly : the case of *fraude à la loi*. This concept, unknown in Europe outside France and the countries influenced by French law, is sharply criticised by the author, and every non-French lawyer will agree with him.

M. Lepaulle's work deserves high praise not only for the amenity of its style and the common sense which permeates it, but also for its general tendency. His hope for a more universal spirit in Private International Law, his opposition to setting up *a priori* dogmas, from which particular rules are to be deduced, his distrust of synthesis, make his book a counterpart to M. Niboyet's *Traité de droit international privé*. M. Niboyet gave French lawyers a new doctrine of Private International Law in which he contrasted nationalism with universalism, dogmatism with electicism, synthesis with analysis, and confessed himself in favour of nationalism, dogmatism, and synthesis. It is the great merit of M. Lepaulle to have taken the opposite view in each of the three contrasts. His view is universalistic, his method analytic and anti-dogmatic. When he deplores that ' theorists, breaking new trails, frequently commit themselves with fatal results to the pursuit of erroneous ideas ', he may have been thinking of the Count de Vareilles-Sommières, of Zitelmann, of Frankenstein, and of M. Niboyet, but he names no one.

Some critics may object that existing literature of the subject might have been more intensively studied. The reviewer is far from blaming him on this account. At any rate, the author must be congratulated on the two favourites he has chosen : Battifol's book on contracts and J. Donnedieu de Vabres' *thèse*.

Martin Wolff.

The Grotius Society, Transactions for the Year 1946, Problems of Public and Private International Law. [Longmans, Green & Co. 1947. xvii and 167 pp. 25s.]

This volume, which contains eight papers read during 1946, places on record the activities of the Society for that year, apart from the annual conference. The Grotius Society has set a high standard of scholarship in the past, and the volumes of its Transactions published since 1915 form a significant contribution to international law. This 32nd volume is no exception. As usual, Public International Law has been given most attention.

Those who heard the memorable address by Sir Arnold McNair, the present President of the Society, some two years ago on ' International Law in Practice ', will turn with pleasure to the published text. Sir Arnold's lucid analysis of the strength and weakness of international law in practice, and particularly in the practice of the Permanent Court of International Justice, ends with a timely appeal for greater interest in international law among English lawyers, so that English law, one of England's ' most valuable exports ' may pull its weight in establishing the rule of law between nations. A paper by Sir Cecil Hurst is always an event of importance in international law. ' A Plea for the Codification of International Law on New Lines ', in which Sir Cecil analysed the reasons for the failure of The Hague Codification Conference in 1930, is already widely known, and its influence on the recent deliberations of the United Nations on codification can be assumed. Of Sir Cecil's two main conclusions, one, that codification must be done by experts and not by Governments, has in effect been adopted by the United Nations in deciding to set up an International Law Commission of experts. It is to be hoped that his other main conclusion, that codification can only succeed if effort in the international sphere is combined with national effort in every country, will also be adopted in as many countries as possible. Sir Cecil envisages in the national sphere a small body of men devoted to the study of international law, working in co-ordination with the plan drawn up in the international sphere, and in this connection, the Grotius Society, which includes amongst its members all the leading British international jurists, can render valuable help to the new International Law Commission.

Professor Cheshire deals with 'Nullity of Marriage and the Conflict of Laws', a subject in which, as he says, 'the courts have got themselves into a mess'. So far as part of the subject is concerned, the question of when the English courts can exercise jurisdiction in nullity suits, the position has recently been clarified by the Court of Appeal in *De Reneville* v. *De Reneville*,[1] a decision which proved the justice of Professor Cheshire's strictures. Among the other valuable contributions of practical and topical value should be noted Mr. Jenks' exhaustive study of 'The Status of International Organisations in Relation to the International Court of Justice'; and Mr. Graupner's analysis of the general principles of the effect of territorial changes on individuals in international law in his paper on 'Nationality and State Succession'. Professor Bentwich returns to a subject which he has made his own in a comparative study of the Covenant and the Charter in the matter of 'Colonial Mandates and Trusteeships'.

Professor Llewelyn Davies examines the limitation imposed on the United Nations by Article 2 (7) of the Charter in his 'Domestic Jurisdiction: a Limitation on International Law'. Since this paper was read, Article 2 (7) has frequently figured in debates at the United Nations and experience seems to justify the conclusion expressed that, given the will to co-operate, the United Nations could, in spite of the limitation created by this article, 'exercise an influence to which no member could remain indifferent' by action short of intervention in matters of domestic jurisdiction. Indeed, it is only the intransigence of States which has led at times to the assertion in the United Nations of the doctrine, for which there seems no justification in international law, that mere discussion of a subject of 'essentially domestic jurisdiction' can amount to intervention. Mr. Diplock in his paper on 'Passports and Protection in International Law' has some interesting conclusions on the relevance of the issue of a passport to the right of an individual to demand, and of a State to accord, protection in international law. It is, however, difficult to agree with Mr. Diplock when he says (at p. 55) that 'it has never been claimed by any State or indeed suggested by any jurist that a State has the right to take up the case of a person who is not either its own subject or a citizen of some territory over which it exercises a protectorate or mandate'. The United States, for one, has, in exceptional cases, successfully asserted the right to exercise protection over aliens domiciled within its territory who have expressed an intention to become United States citizens. The practical importance of the possibility of development of international law along such lines to the Stateless person or political refugee (increasing categories in the modern world) is evident.

L. B. SCHAPIRO.

[1] Vol. II, I.L.Q., p. 95, *supra*, and [1948] 1 All E. R. 56.

The American Journal of International Law, 1947. [Published by the American Society of International Law. 1018 pp. and Supplementary Volume of Official Documents 150 pp. Annual subscription to non-members of the society $5 per annum.]

With the end of the calendar year 1947, *The American Journal of International Law* completed its forty-first consecutive year. Throughout this period of accelerating and international integration under the impacts of two World Wars and an ever-widening range of international issues, the *Journal* has retained the same general format and publication pattern. The 1947 volume of the four law quarterly issues, together with the Proceedings of the Annual Meeting of the American Society of International Law, covers some 1,400 pages. Its comprehensive international law coverage has been evolved through its balanced pattern, including leading articles, editorials, current notes, chronicles of international events, judicial decisions involving questions of international law, book reviews and notes, periodical literature of international law and relations and Supplementary Section of Official Documents separately paged and indexed.

Increasingly the pace and range of international issues, plus the inevitable limitations of space and finance in an inflationary spiral, require a high degree of selectivity by its distinguished editorial board and staff. A review of the 1947 volume with its world-wide contents shows that this requirement has been satisfied.

The leading articles in the January issue cover a broad range of subject-matters of current international interest. Former Justice of the Permanent Court, Manley O. Hudson, begins with a review of ' The Twenty-fifth Year of the World Court '. This is the twenty-fifth in Judge Hudson's series of annual articles on the World Court, the publication of which began in 1923 in the *Journal* (Vol. 17, p. 15). He emphasises the continuity between the Permanent Court under the Statute of 1920 and the recently constituted International Court of Justice. From his broad background of experience, he comments in detail on the Session of the Court of 1946, Advisory Opinions, Privileges and Immunities, Organisation of the Registry, as well as Emoluments of Judges and Officials and the Budget of the Court. The same issue also included two discussions of the Nuremberg Trial. The first was ' The Nuremberg Trial and International Law ', by George A. Finch, the distinguished editor-in-chief of the *Journal*, and for many years secretary of the Carnegie Endowment for International Peace. Mr. Finch makes some searching observations with respect to the basic legal philosophy underlying the Nuremberg decision. The second was ' The Law of the Nuremberg Trial ', by Professor Quincy Wright.

The April issue carries a substantial contribution to current international thinking in the article by Professor Philip C. Jessup on ' Modernisation of the Law of International Contractual Agreements ' This article was written before Professor Jessup took leave

of absence from his international law post at Columbia University to become a member of the United States delegation to the United Nations. With his wealth of experience embracing service in the Department of State, on the board of editors of the *Journal* and in the academic field, there is no one better qualified to appraise and evaluate the current trends running strongly in international contractual law.

The July issue finds the *Journal* in the full flow of the widely developing international stream with leading articles on the following significant developments: (1) 'The New World Health Organisation', by Walter R. Sharp, Chairman, Department of Government, College of the City of New York; (2) 'The Charter of the United Nations and the Lodge Reservations', by Leo Gross of the Fletcher School of Law and Diplomacy; (3) 'Immunity of Officers and Employees of the United Nations for Official Acts: The *Ranallo Case*', by Lawrence Preuss of the Board of Editors; and (4) 'War Crimes by Enemy Nationals Administering Justice in Occupied Territory', by Alwyn V. Freeman, a member of the Bar of the State of Michigan, and formerly assistant to the Legal Adviser, United States Department of State.

In the fourth and final October issue, the Nuremberg theme is projected into the future in an article on 'The Nuremberg Trial and the International Law of the Future', by Professor F. B. Schick, Associate Professor of Political Science, University of Utah. It is interesting and significant that Professor Schick's venture into the role of prophecy in the *Journal* in the field of the future international criminal law of war is paralleled by his equally trenchant comment on the future of the peace agency of the world in his leading article in the current Spring issue of this *Quarterly* entitled 'Towards a Living Constitution of the United Nations'. This number carries another article of value to legal practitioners on 'Compensation for War Damage to American Property in Allied Countries', by C. Arnold Fraleigh, assistant to the Legal Adviser of the United States Department of State. He discusses both the nationality and territorial bases of compensation.

In addition to the more elaborate and extended treatment of international topics of the leading articles, there are equally valuable expressions of considered views on current international developments in the editorials by members of the editorial board and staff and the briefer current notes by members of the American Society of International Law. In these categories are found editorials by George Finch, editor-in-chief, on 'The International Court of Justice'; 'International Law and International Organisation', by Professor Edwin Borchard; 'The Lima Conference of Inter-American Bar Association', by William Roy Vallance, Secretary-General of the Association and one of the senior Legal Advisers of the State Department; and 'The Cambridge Conference of the International Law Association', by William S. Culbertson. In the April issue is

a current note of special interest by George Finch on the Inter-American Academy of Comparative and International Law. This section session was held at Havana, Cuba, February 8–28, 1947. It had a distinguished faculty of recognised international leaders in the Western Hemisphere. Its sessions were well attended by students from many of the Pan-American countries. This academy is an outgrowth of the Inter-American Bar Association. The proceedings will be published.

The July issue carries a current note of interest by editor-in-chief George Finch addressed to this *International Law Quarterly* to which he extends a warm welcome as a collaborator in the international field and pays tribute to its brilliant leadership with individual reference to the honorary joint editors and its editorial committee. With this warm welcome went the high hope for a long period of close collaboration in advancing a more adequate appreciation of international law. Elihu Root, one of the distinguished founder members of the American Society of International Law, early recognised the imperative need of the broadest understanding of international law by the citizenry of democratic members of the family of nations.

The October issue has an editorial by Professor Borchard of current interest on 'Intervention—The Truman Doctrine and the Marshall Plan'. His candid comment serves to strip away some of the confusion stemming from discussion in the press and radio. Without venturing predictions, he pointed out obstacles that could cause the Plan to founder. A current note in this issue also covers the appointment of Charles G. Fenwick to be chief of the new Department of International Law and Organisation in the Pan-American Union. Dr. Fenwick, long Professor of Political Science at Bryn Mawr College, has served in recent years as United States delegate to various Pan-American conferences and has served as a member of the Inter-American Neutrality Committee and finally as a member of the Inter-American Juridical Committee sitting in Rio de Janeiro.

Howard S. Le Roy.

India Quarterly. Issued by the Indian Council of World Affairs. [Delhi. 1947–8.]

With the advent of freedom from external control, as an equal and independent unit of the British Commonwealth of Nations, India has already taken her place among the United Nations as one of the foremost countries of Asia. In the future, an awakened Asia is bound to play an increasingly influential part in world affairs. It is, therefore, all the more necessary that Western readers should study carefully the matters that are today regarded as of high

importance to Asiatic readers, as well as the comments of the leaders of the Asiatic countries on current events in the world at large. Subject to internal stability and to good relations with the neighbouring dominion, India's contribution in this direction may well be noteworthy.

India Quarterly, the organ of the Indian Council of World Affairs, the New Delhi counterpart of Chatham House, is a periodical aiming at the highest standards of comment and criticism and an objective study of what is happening both in India itself and in the larger sphere of world affairs. That need surprise no one who is familiar with the names of the Editorial Board headed by Sir Maurice Gwyer, Vice-Chancellor of Delhi University and formerly Chief Justice of the Federal Court of India, and of its managing editor, Dr. A. Appadorai, who is already well-known in international circles, where he has represented his country on several occasions.

A recent issue of this most valuable and authoritative magazine includes such distinguished contributors as Dr. P. N. S. Mansergh, on 'Britain and the Dominions: Consultation and Co-operation in Foreign Policy'; Dr. Colin Clark, on 'The Rate of Economic Development in Different Countries'; Sir W. Ivor Jennings, on 'The Government of Ceylon'; Mr. Yih-sheng Hsyu, on 'The New Constitution of China'; Dr. D. K. Malhotra, editor, *The Eastern Economist*, on 'Machinery for Planning in India'; Mr. P. S. Narasimhan, Secretary to the International Labour Office (India Branch), on 'A Review of Labour Legislation'; and Mr. C. Kondapi, on 'Indians Overseas' (there are nearly four millions of them). This, in itself, is a wide variety of subjects of high importance and some intricacy, many of them requiring a specialised knowledge of international and technical affairs and of the current of events making for stability or the contrary in the relatively near future.

Other matters of great significance dealt with in the latest issue to hand of *India Quarterly* are the sessions of the United Nations General Assembly and its ancillary Committees and Commissions, in September and October, 1947, in which India took a notable part; and also the Preparatory Asian Regional (I.L.O.) Conference at New Delhi, last October; the first meeting of the World Food Council of the F.A.O., at Washington, the Plenary Session of the UNESCO Conference, at New Mexico, the Executive Bureau of the World Federation of Trade Unions, at Paris, the second session of the Economic Commission for Asia and the Far East, at Baguio, and the International Trade Organisation (ITO) Conference, at Antwerp, all in November, 1947, in which India actively participated.

Summaries of the proceedings of the Indian Army Mission to the United Kingdom and the Tibetan Trade Mission to India are also included. Forthcoming issues will doubtless deal at length with the economic and political affairs of South East Asia, with

which India is very deeply concerned, though, apparently, not to so great an extent as Pakistan. Reviews of books of special interest to India, as well as those on various aspects of international affairs, by a number of distinguished contributors are another prominent feature of the magazine. We shall look forward with the greatest interest to a perusal of *India Quarterly* as it appears.

H. S. L. Polak.

International Contracts. Being the fifteenth Lecture on the David Murray Foundation in the University of Glasgow, delivered on March 4, 1948. By G. C. Cheshire, D.C.L., F.B.A. [Glasgow: Jackson, Son & Company. 1948. 94 pp. 6s.]

All who have had occasion to use the chapter on contracts in the third edition (1947) of Professor Cheshire's *Private International Law* cannot have failed to profit from amongst other matters, the more detailed analysis there embodied in the work for the first time of the part played by intention in the formation of the proper law of a contract. But the author himself was not satisfied. On the eve of publication, as he recorded in the preface (p. v) his feeling was that 'the chapter on contract leaves a great deal to be desired in the matter of arrangement and fulness. I realised too late that the subject requires to be broken down into separate fragments.' In the present most valuable reprint of his David Murray Foundation Lecture we have the results to date of that further analysis.

The first result is an irresistible challenge to the widely accepted view that in the eyes of English law, parties to an international contract enjoy an almost unrestricted choice of the law to govern it. Belief in the efficacy of such clauses as 'the contract shall be governed by the law of country X' or 'shall take effect according to the law of country Y' must inevitably be severely shaken, where it existed, in all those who give the present small volume the close attention it deserves. Not that apparent authority for such belief is lacking, as the following examples show. 'It is open to the parties to stipulate in express terms that the law of a particular country shall apply. If they do so, that law is applicable': *per* Swinfen Eady, J., in 1910.[1] 'The legal principles which are to guide an English court on the question of the proper law of a contract are now well settled. It is the law which the parties intended to apply. Their intention will be ascertained by the intention expressed in the contract, if any, which will be conclusive': *per* Lord Atkin in 1937.[2] 'No

[1] *British South Africa Co.* v. *De Beers Consolidated Mines Co., Ltd.*, [1910] 1 Ch. 354, 381.

[2] *R.* v. *International Trustee*, [1937] A.C. 500 at p. 529.

difficulty arises when the parties themselves expressly stipulate that their contract shall be governed by a particular law': *Halsbury's Laws of England*.[3] Taken at their face value, statements such as these are, Professor Cheshire convincingly demonstrates, dangerously misleading. The first part of the present paper is devoted to challenging the autonomist view which they appear to justify on the basis of the following five propositions: (1) It is misleading to assume that an international contract is governed in all its aspects by a single law; (2) For the purpose of ascertaining the extent to which the parties are free to choose the proper law, an essential and a fundamental distinction must be drawn between the creation of an obligation and the substance of an obligation once it has been validly created; (3) When it is said that the proper law is a matter of intention, all that is meant is that the parties are free to choose the connecting factors, but that, having done this, they are taken to intend that the governing law shall be the law of the country in which the chosen factors show the contract to be localised; (4) No decision except one has been found which allows the parties to dictate what law shall determine whether their contract has been validly created; (5) Where the law expressly chosen by the parties has been accepted by the courts as the proper law to govern the substance of the obligation, there has always been some factual connection, and generally a substantial connection between the contract and the country of the chosen law.

These propositions are overwhelmingly supported by the decisions analysed. The recalcitrant *Vita Food Products Inc.* v. *Unus Shipping Co.* (1939) A.C. 277, the concern of the fourth proposition, is dealt a near mortal blow by the comment that 'an interesting feature of the decision is that the court, although it insisted that everything turns upon intention, gave effect to what the parties evidently did not intend. . . . it is scarcely credible that it will survive as an authority' (pp. 32–3). The result of the challenge is to re-establish in modern perspective the view of Westlake that the governing law is in fact selected by the English courts 'on substantial considerations, the preference being given to the country with which the transaction has the most real connection and not to the law of the place of contract as such',[4] whilst at the same time Dicey's Rules 155 and 161 sub-rule (i), are placed in their true perspective. The parties may not choose a law, as such, for their contract at all; the choice of law is a matter of law for the court. Consciously or unconsciously, however, the parties select the factual elements which connect the contract with two or more countries. The proper law depends upon these elements (of which an expressed intention to choose a given law may be one)

[3] Vol. 6, p. 264.
[4] *Private International Law*, 7th ed., p. 302.

and which 'can conveniently be called its localising elements. These may be numerous and diverse, and it is the country in which they are most densely grouped that constitutes the centre of the contract and furnishes the governing law' (pp. 27–8). This supple principle, very English in its nature, has on reflection much to commend it in preference to more hard-and-fast principles such as the lex loci contractus (frequently unascertainable) or the lex loci solutionis, though its application may of course often produce the same result. The present examination also prompts the comment that the English law of international contracts is far more certain than that of many other countries—as a perusal of, for example, the second volume of Ernest Rabel's comparative study of the *Conflict of Laws* reveals. To that extent the practitioner advising on an international contract is assisted, though where there is a choice of forum in which an action may be brought, he is still far from being able with certainty to predict choice of the same governing law by the different courts, let alone similar application of that law when selected.

The second part of the present study examines the English law determining the different aspects of an international contract; capacity, the fact of agreement, the reality of agreement, formalities, essential requirements other than formalities, recognition of the obligation, legality of purpose, interpretation, substance of the obligation (a newer and better term for essential validity), voidable contracts, performance, discharge, remedies for breach. The result of this examination is an overwhelming demonstration of the truth of the first of the five propositions contained in part one. It will give the many earnest seekers after a unitary law most seriously to think.

E. H. Wall.

The Conflict of Laws. By R. H. Graveson, ph.d., s.j.d., ll.m. [London: Sweet and Maxwell, Ltd.; Stevens & Sons, Ltd. 1948. 394 pp. 30s.]

'This book', as the author states in the preface, 'has been written primarily for students approaching the conflict of laws for the first time', and attempts 'to state English law as it stood in March, 1948'.

Ranging, as it must do, over virtually the whole field of English law, the subject of the conflict of laws is peculiarly difficult to treat in a students' work. The author has, however, succeeded admirably in this. At the same time, while offering in smaller compass than has hitherto been available a comprehensive and succinct introduction to private international law, he does not fail to provide illuminating and novel treatment of themes that are more

fully dealt with in larger works, such as Dicey's and Cheshire's standard books.

Thus, for example, there is the following spirited comment on the well-worn theme of the foreign court theory: 'The English judge is bound by his oath of office to do justice according to English law (including the English conflict of laws). While it may be arguable that the application of a foreign law by an English judge on the fictitious basis that he is no longer an English judge but a foreign one is difficult to reconcile with the terms of his oath, the English judge, in applying the foreign court theory of renvoi, is in fact applying a principle of English law' (p. 56). Or, as another example, there is the following passage on the recent Court of Appeal decision in *De Reneville* v. *De Reneville* [1948] 1 All E.R. 56: 'From the analogy of the question of the choice of law arising in cases of marriages void according to the English conflict of laws, the Court of Appeal has thus introduced the question of choice of law into cases of marriages regarded by English municipal law, and hitherto by the English conflict of laws, as voidable, through the classification of grounds for annulment in such marriages as matters of essentials of the same nature as capacity to marry' (pp. 333–334).

These passages indicate the flavour of the work as a whole, which is eminently readable, informative without being over didactic, and not infrequently provocative.

'The theory set forth in these pages is not primarily statutory, international or territorial, though by its nature it approaches most closely to the territorial doctrine. It is a theory of English judicial justice, based on a consideration of what English statutes say and what English judges do in cases to which the conflict of laws applies' (p. 25). This is business-like and sensible and at first sight might perhaps be read as an adoption of the local law theory. There is, however, no intention on the author's part to exclude the vested or acquired right theory where in fact it provides an adequate working basis, let alone challenge its logicality in an attempt to arrive at one all-embracing theory. '. . . The purpose of any system of conflict of laws is to give effect to validly acquired foreign rights . . .' (p. 270). It may perhaps be permitted to suggest a small amendment. In the chapter on Jurisdiction Over Foreign Land it is stated that often 'the assumption of jurisdiction has been made as a matter of course and without argument, as was the case in *Re Duke of Wellington* (deceased) [1947] Ch. 506', (pp. 259–260). While this was true of the *Wellington Case* in the Chancery Court, the question of jurisdiction was in fact raised at the outset of the appeal (December, 1947) by the Master of the Rolls, and the order of the Court of Appeal was later made on the basis of personal jurisdiction (see Vol. I, *International Law Quarterly*, p. 552, note).

The great practical importance of the study of the conflict of

laws at the present time emphasises the need for just such a book as this for those who are embarking on that study for the first time. It will also repay reading by those who already have experience of this aspect of English law.

E. H. W.

A Treatise on Hellenic Maritime Law. By Professor K. B. Spiliopoulos. [Athens, 1948. xiv and 520 pp. (in Greek).]

This is both an academic and a practical treatise on maritime law and although mainly dealing with Greek law, contains important references to the principal maritime legislations of Europe and America. It thus provides a comparative study of maritime law which may prove useful in the understanding of the various systems of law and their eventual unification, especially as a detailed review is given in this work of the international jurisprudence.

The volume is divided into an introduction and three parts. The introduction summarises the historical evolution of maritime law, the efforts already made for its unification, the relevant legislation in force in Greece and other European countries and ends up with a full bibliography. The first part is devoted to navigation and sea traffic, the juridical conception of the ' ship ' and her ownership, including a pro tempore ownership, the rules for ensuring the safety of navigation, and the sanitary and customs regulations. The second part is subdivided into three sections and compares the condition of ships under public maritime law with that under private law. Several sections in the first category examine the manner of identification and appropriation of a ship, *viz.*, her name, code numbers, tonnage, nationality and flag, port register, mortgage registers, shipping documents and seaworthiness. On the other hand, the sections under private law deal with the legal character of the ship, her appurtenances, the various modes of ownership and all the rights in rem on ships other than ownership. The third part of the book, subdivided into five principal sections, analyses the difference between the meaning of the terms ' shipowner ' and ' owner pro tempore ', and the various limitations on their respective responsibility. Particular attention is given to the legal responsibility of the shipowner with regard to the acts of the master and crew.

Prof. Spiliopoulos' book which brings the subject up to date and is very carefully written provides a welcome addition to the literature of maritime law, more particularly in view of the rather limited number of works which are at present available on this subject.

J.

British Military Administration in Africa, 1941–1947. By LORD RENNELL OF RODD. [London: H.M.S.O. 1948. 637 pp. 17s. 6d.]

LORD Rennell of Rodd, who served as both Controller of Finance and Accounts and Chief Political Officer of British Military Administration in Africa, has provided an interesting and instructive account of the history and vicissitudes of the British occupation authorities in Africa. To a great extent the larger part of this work holds little interest for the lawyer as it is concerned with the history of the African campaigns and the financial and general administrative problems that arose from 1941–1947.

Problems soon arose in connection with the re-occupation of Ethiopia. The Emperor regarded himself as entitled to take over the complete administration of the country by virtue of *postliminium*. The British, on the other hand, having recognised Italy as the sovereign of the country, regarded their forces as military occupants, for whom 'such questions as frontier rectifications, major public works, or the constitutional position of a local ruler' were not matters to be taken into account, 'except in so far as it may be necessary to do so in connection with ordinary day to day administration' (p. 55). Nevertheless, for political reasons, the position of the Emperor as ruler of Ethiopia was recognised. Even when the Emperor was restored to his former position, his sovereignty was not unlimited. Under the Anglo-Ethiopian Agreement of 1942 something in the nature of capitulations was introduced. By Article 5, any foreigner who is a party to judicial proceedings, civil or criminal, possesses the right to have the case transferred to the High Court, in which event the Bench must include at least one British judge (p. 541).

In Italian North Africa various economic problems arose, but 'international law precluded the introduction of a complete, and more economical system of administration suitable to the simple needs of the indigenous population after the departure of the Italians' (p. 263). It was found possible in 1943, however, to adopt a customs union between Cyrenaicia and Tripolitania (p. 281). This is not surprising in view of the fact that the late Sir William Malkin supported the Controller of Finance and Accounts in his view that financial reforms could be introduced on account of economic necessity and good government, and 'that his actions did not necessarily require to be justified by military necessity or the plea that they ought to correct something which was contrary to humanity and conscience' (p. 344). This attitude is fully in keeping with Lord Rennell's repeated assertion that the Regulations concerning military occupation embodied in Hague Convention IV are theoretical and out of date (pp. 344, 419).

This criticism of the theoretical nature of the law concerning

occupation is also emphasised in Chapter XIV which deals with 'Law: International and Internal'. Here Lord Rennell points out that when the occupation began the only books available to the legal advisers were the *Manual of Military Law* and a copy of Oppenheim's Volume 2, while there was no English translation of the Italian Penal Code available, and it appears that London was not at first particularly helpful in this matter (p. 321). In this chapter, Lord Rennell lends indirect support to those who advocate the inductive approach to international law. He points out that 'considerable guidance on matters of general principle was, of course, found in the leading textbooks on international law as and when they became available, but, without casting aspersions on the authors of these learned works, it became increasingly apparent to the legal staff that the nature of the problems with which they were faced found no practical and simple solutions in the textbooks. It will perhaps only be when an international lawyer is himself called upon to take part in the legal affairs of a Military Administration as an Army officer that he will truly appreciate the multifarious difficulties which can arise and seek to provide an answer to them in a textbook which one may hope that he will write' (p. 322). Perhaps one may express the hope that Professor H. A. Smith will read this book, and be moved to provide the book, based on his experiences in Europe, for which Lord Rennell calls.

L. C. Green.

The Right to Fly. By John C. Cooper. [New York: Henry Holt & Co. 1947.]

Fixel on the Law of Aviation. Third Edition. [The Michie Company, Charlottesville, Virginia. 550 pp.]

With all the directness of the high speed physical arts the Foreword's first short sentence contains the theme of the first book, 'Air Power is today the most dynamic force in the life of nations'. No man in the United States is better qualified to elaborate this theme than John C. Cooper, the author. With remarkable concentration and continuity he has devoted his professional life to an ever-widening evolution of aeronautical law at the international level. For many years following a distinguished service in the Navy in World War I, he served as Vice-President and principal legal officer of the greatest globe-girdling air system. More recently he has enlarged the range of his contributions by engaging in special work in the School of Advanced Studies at Princeton. Throughout a long career he has made notable contributions on many special assignments to International Air Conferences and to such technical agencies as CITEJA.

The theme is broadly developed through some eleven chapters. The authority and value of the book is increased with generous documentation. This includes footnotes; a bibliography of general source materials covering books, articles, and pamphlets, a chronological listing of International Conferences, and a comprehensive list of official documents. Documentation is further broadened by six appendices with the texts of the Paris Convention and three of the Chicago Conference Conventions. A full and careful index also adds to the book's utility.

The author traces the evolution of the sovereign right to fly as reflected in the Paris Convention of 1919 and subsequent international agreements up to and including the Chicago Convention of 1944. He then relates this basic right to the capacity to fly in discussing the elements of air power. Strong stress is put on the points that air power, the ability of a nation to fly, is indivisible, that it is used at times for civil air transport and at times for military striking force, that air power will continue to exist as long as a nation has the right to fly. These broad principles are then used as a yardstick to test the ' complete and tragic failure ' of the Treaty of Versailles to disarm Germany in the air after 1919. The failure is attributed directly to the artificial and unrealistic method of attempting to separate military and civil uses of air power, prohibiting one, and not interfering with the other, nor with the soon-resumed German control and sovereignty of its air-space. Following a detailed review of the Air Terms of Peace, the proceedings of the Aeronautical Commission and the Supreme War Council, the author fixes responsibility for making the ultimate decision on the American delegation and on President Wilson and Secretary Lansing. The decision was then taken on a proposed amendment to Article 45. The military and naval experts of Great Britain, France, Italy and Japan had agreed on the necessity of control of German commercial aviation after the signature of the Treaty of Peace to effectuate complete air disarmament.

The author states that the demilitarisation plan of the Treaty of Versailles was ' unsound in theory ', ' unworkable in practice ', and would be even more unsound and unworkable today.

Coming down to the present period it is stated that three air power control problems face the world : (1) The air power future of Germany and Japan, the principal ex-enemy nations; (2) the desire and need for regulation and reduction in armaments in aid of world peace; and (3) the formula to attain a proper degree of control, balancing international world needs against national aspirations.

With respect to the air power future of the ex-enemy nations, air power of today is no longer the novel force it was in 1919 and the same mistakes of statecraft should not be repeated. However, the proposed draft treaty for Germany was submitted by the United States to the Council of Foreign Ministers at the Paris meeting on April 29, 1946. A similar draft treaty for Japan was released to the

Press on June 21, 1946. Both nations were to be left in complete sovereign control of their own air-space on withdrawal of occupation forces as was Germany after World War I. That air power is indivisible, that military and civil air power are merely different applications of the same dynamic force—the lesson of Versailles may be lost.

In discussing the Disarmament Resolution of the General Assembly of December 14, 1946, the author dismisses as impracticable (1) any change in geographical status or boundaries, (2) fixing the amount of aircraft fuel or construction material to be produced or imported, (3) limitation of appropriations of national funds for air forces, (4) restrictions on aeronautical activity of the nation's population, and (5) limitation of the nation's general scientific and technical skills. He concludes that none of the basic elements of capacity to fly can be controlled in aid of partial air disarmament except possibly the nation's manufacturing industry. The dilemma is whether real international air disarmament is more important than the preservation and continued progress of air transport. The atomic bomb has sharpened the horns of this dilemma.

On two occasions the question of an agreement for air disarmament has been considered. At the Washington Arms Conference of 1921 Secretary of State, later Chief Justice, Hughes stated the view of the conference that no answer could be found to the arguments of its sub-committee. This sub-committee, including Major General Mason M. Patrick of the United States Army and Captain Albert Roper of the French Army, concluded that any attempt to limit commercial aircraft would be 'disastrous from the point of view of world progress'. The author comments that Chief Justice Hughes and the Washington Conference understood in 1921 that air power was not divisible even though the Paris Peace Conference did not understand two years before.

The League of Nations Disarmament Conference did not result in any acceptable air disarmament proposal. There was much discussion of the French internationalisation plan for civil aviation. The Swedish delegation sought a middle-of-the-road compromise which was also impracticable.

The third current problem, the search for a control formula balancing international needs and national interests, is covered in Chapter 7 on Air Power and World Commerce, and Chapter 8 on the Chicago Conference of 1944 and World Organisation. In the twenty years from 1919 to 1939, the dynamic force of air power had criss-crossed countries and continents with a network of air trade routes. This epic evolution took place in spite of a political pattern unfavourable to trade expansion. The unfavourable political climate stemmed from the Paris Convention with its principle of sovereign control of airspace.

The author states that the Chicago International Civil Aviation Conference of 1944 has proved itself a great success. It has set up

the first real world organisation for civil aviation. It is, of course, limited by the non-participation of Soviet Russia. It is also insisted that the omissions of the Chicago Convention should be remedied at the earliest opportunity. These omissions to the number of eight are set out in some fullness.

The three concluding chapters analyse closely some of the air power assets and problems of the dominant world Powers, the Soviet Union, the United Kingdom and the United States. The discussion of the geographical factors and projecting the 'air penetration' possibilities of each Power are powerfully pointed up by thirteen charts. These global charts were prepared by H. Lester Cooke, Jr., under supervision of John P. Stewart, Associate Professor of Astronomical Physics at Princeton University. Chart 13 indicates Probable Effectiveness of Atomic Bombing of the Los Angeles Area.

Mr. Cooper has made a most valuable contribution in this highly important special field. He makes a strong case for an international air navigation pattern that will permit the full impact of the dynamic force of air power to be brought to bear on the advancement of international civil aviation. Unhappily, in the opinion of this reviewer, world political trends being what they are, the early realisation of the author's views would not seem to be as promising as could be desired.

In January, 1948, Rowland W. Fixel brought out this third edition of his *Law of Aviation*. The accelerating evolution and the growing volume of this new body of law is evidenced by the fact that twenty years have brought three editions, and this third edition followed the second by a period of slightly more than two years. This great growth has proceeded on all political levels in the past two years. During this period most extensive progress has been made in the international aviation area.

The book consists of eighteen chapters of textual matter, five appendices, a table of cases and an index.

The five appendices all relate to recent international legislative Acts. These include: (1) 'Interim Agreement on International Civil Aviation'; (2) 'Convention on International Civil Aviation'; (3) 'International Air Services Transit Agreement'; (4) 'International Air Transport Agreement'; and (5) 'Assistance to Civil Aircraft (Domestic or Foreign) at Oversea Bases'.

Throughout the text the accent is on international aeronautical law and closely related legal fields. Of the eighteen chapters, seven deal directly with international matters. After a slow start in Chapter I with a collection of definitions not too comprehensive and rather more technical than legal, the author moves at once into an orientation of the field in Chapter II: Relation of the Law of Aviation to Other Branches of Jurisprudence. Among branches discussed are military, admiralty and international law. In covering

the Historical Background of the Development of Aviation Law in Chapter III, the author attributes to war a major part in the origin and growth of this new body of law. There follows a skeleton summary starting with the Hague Conference and running down through the recent Chicago Aviation Conference which produced most of the agreements so fully documented in the appendices.

The basic considerations involved in Sovereignty in Airspace are reviewed in Chapter IV, including a paragraph on the Laws of Great Britain. In some twenty-six brief paragraphs in Chapter V the Relation of the Law of Aviation to International Law is summarised. In Chapters VI and VII the author discusses Military Aviation Law and Aerial Warfare respectively. The author as a former Colonel of the Judge Advocate General's Department of the United States Army during the war and as a member of the Detroit, Michigan and District of Columbia Bars enjoys a broad background from which to discuss the difficult current problems in the field. His conclusions with respect to justification of the Hiroshima and Nagasaki bombings, and the fact that none of the class 'A' defendants in the Nuremberg Trial were indicted for terror bombing of cities probably will not pass without critical comment from some quarters. The first sentence in the Conclusion in paragraph 134 through omission or misprint does not state the conclusion intended.

The Seadrome is the subject of Chapter X, consisting of six brief paragraphs covering about two pages of text. It is necessarily international but speculative and unsupported except by one or two exploratory legal periodical articles on the Seadrome. It may be felt by some that the significance of this subject is not deserving of treatment in a separate chapter.

The tables of cases and the index are not exhaustive, but are aids to the use of the book. The cases are keyed to the paragraphs of the text and the notes where they are cited. Many of the cases cited are so recent as not to carry citations to the law reports where the full reports may be found. The index in its arrangement is not very comprehensive and not always clear. This applies particularly to certain international law topics not found as major headings at points where they might be expected.

A bibliography, even though brief, might make the book more useful. The law of aviation developing on all political levels and in legislative, administrative and decisional phases on each level with widely dispersed authorities and sources might seem to call for full use of every integrating tool available.

This edition is a useful contribution to this fast flowing field. It also raises a question as to whether air law has not mushroomed beyond the compass of satisfactory treatment in a single volume.

H. S. L. R.

SELECTED OFFICIAL DOCUMENTS

THE following documents are included in this issue :—

1. Convention on the Prevention and Punishment of the Crime of Genocide.

By a unanimous vote of all the fifty-five members present, the General Assembly of the United Nations, meeting at the Palais de Chaillot, Paris, on December 9, 1948, approved the text of a Convention on the Prevention and Punishment of the Crime of Genocide.

As will be seen from the Resolution which precedes the Convention, the General Assembly proposes the Convention for signature and ratification or accession. The Assembly also adopted two other resolutions : one, adopted by forty-three votes to six, with three abstentions, invites the International Law Commission to study the desirability and possibility of establishing an international judicial organ; the other, adopted by fifty votes against none, and no abstentions, recommends that parties to the Convention should extend its application to dependent territories under their administration.

2. Resolution on ' Injuries incurred in the service of the United Nations ', adopted by the General Assembly on December 11, 1948.

This resolution, although small in itself, is the pivot of some very interesting legal problems. The question of the international personality and the status of the United Nations under international law is involved. There is a challenge to the old theory that States and States only can be persons under international law. It will be appreciated that what is said about the international personality of the United Nations will apply broadly speaking to the specialised agencies, and possibly in some degree to other international organisations. The question to be put to the International Court arises out of a report by the Secretary-General in which he asked whether he had the power to make claims against States in cases where officials of the United Nations were injured in the course of their duties. He was moved to make this report by the loss of life of officials of the United Nations in connection with the conflict in Palestine.

3. Belgrade Convention on the Danube, 1948.

A summary of the history surrounding this Convention will be found in the *Editorial Note* printed at pp. 469 to 472, *supra*. As there indicated, this Convention was not accepted by the

delegations representing the United Kingdom, the United States and France.

The Convention is published in its French text as it is understood that no official English translation exists at present.

1

PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE

A

Resolution relating to the adoption of the Convention on the Prevention and Punishment of the Crime of Genocide, and text of the Convention

The General Assembly

Approves the annexed Convention on the Prevention and Punishment of the Crime of Genocide and proposes it for signature and ratification or accession in accordance with its article XI.

ANNEX

Convention on the Prevention and Punishment of the Crime of Genocide

The Contracting Parties,

Having considered the declaration made by the General Assembly of the United Nations in its resolution 96 (I) dated 11 December 1946 that genocide is a crime under international law, contrary to the spirit and aims of the United Nations and condemned by the civilised world;

Recognising that at all periods of history genocide has inflicted great losses on humanity; and

Being convinced that, in order to liberate mankind from such an odious scourge, international co-operation is required;

Hereby agree as hereinafter provided :

Article I

The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.

ARTICLE II

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such :

(a) Killing members of the group;
(b) Causing serious bodily or mental harm to members of the group;
(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) Imposing measures intended to prevent births within the group;
(e) Forcibly transferring children of the group to another group.

ARTICLE III

The following acts shall be punishable :

(a) Genocide;
(b) Conspiracy to commit genocide;
(c) Direct and public incitement to commit genocide;
(d) Attempt to commit genocide;
(e) Complicity in genocide.

ARTICLE IV

Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.

ARTICLE V

The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III.

ARTICLE VI

Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

ARTICLE VII

Genocide and the other acts enumerated in article III shall not be considered as political crimes for the purpose of extradition.

The Contracting Parties pledge themselves in such cases to grant extradition in accordance with their laws and treaties in force.

Article VIII

Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III.

Article IX

Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.

Article X

The present Convention, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall bear the date of .....

Article XI

The present Convention shall be open until 31 December 1949 for signature on behalf of any Member of the United Nations and of any non-member State to which an invitation to sign has been addressed by the General Assembly.

The present Convention shall be ratified, and the instruments of ratification shall be deposited with the Secretary-General of the United Nations.

After 1 January 1950 the present Convention may be acceded to on behalf of any Member of the United Nations and of any non-member State which has received an invitation as aforesaid.

Instruments of accession shall be deposited with the Secretary-General of the United Nations.

Article XII

Any Contracting Party may at any time, by notification addressed to the Secretary-General of the United Nations, extend the application of the present Convention to all or any of the territories for the conduct of whose foreign relations that Contracting Party is responsible.

Article XIII

On the day when the first twenty instruments of ratification or accession have been deposited, the Secretary-General shall draw up a procès-verbal and transmit a copy of it to each Member of the United Nations and to each of the non-member States contemplated in article XI.

The present Convention shall come into force on the ninetieth

day following the date of deposit of the twentieth instrument of ratification or accession.

Any ratification or accession effected subsequent to the latter date shall become effective on the ninetieth day following the deposit of the instrument of ratification or accession.

ARTICLE XIV

The present Convention shall remain in effect for a period of ten years as from the date of its coming into force.

It shall thereafter remain in force for successive periods of five years for such Contracting Parties as have not denounced it at least six months before the expiration of the current period.

Denunciation shall be effected by a written notification addressed to the Secretary-General of the United Nations.

ARTICLE XV

If, as a result of denunciations, the number of Parties to the present Convention should become less than sixteen, the Convention shall cease to be in force as from the date on which the last of these denunciations shall become effective.

ARTICLE XVI

A request for the revision of the present Convention may be made at any time by any Contracting Party by means of a notification in writing addressed to the Secretary-General.

The General Assembly shall decide upon the steps, if any, to be taken in respect of such request.

ARTICLE XVII

The Secretary-General of the United Nations shall notify all Members of the United Nations and the non-member States contemplated in article XI of the following :

(a) Signatures, ratifications and accessions received in accordance with article XI;
(b) Notifications received in accordance with article XII;
(c) The date upon which the present Convention comes into force in accordance with article XIII;
(d) Denunciations received in accordance with article XIV;
(e) The abrogation of the Convention in accordance with article XV;
(f) Notifications received in accordance with article XVI.

ARTICLE XVIII

The original of the present Convention shall be deposited in the archives of the United Nations.

A certified copy of the Convention shall be transmitted to all

Members of the United Nations and to the non-member States contemplated in article XI.

ARTICLE XIX

The present Convention shall be registered by the Secretary-General of the United Nations on the date of its coming into force.

B

Resolution relating to the study by the International Law Commission of the question of an international criminal jurisdiction

THE GENERAL ASSEMBLY,

CONSIDERING that the discussion of the Convention on the Prevention and Punishment of the Crime of Genocide has raised the question of the desirability and possibility of having persons charged with genocide tried by a competent international tribunal,

CONSIDERING that, in the course of development of the international community, there will be an increasing need of an international judicial organ for the trial of certain crimes under international law,

INVITES the International Law Commission to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by international conventions;

REQUESTS the International Law Commission in carrying out this task to pay attention to the possibility of establishing a Criminal Chamber of the International Court of Justice.

C

Resolution relating to the application of the Convention on the Prevention and Punishment of the Crime of Genocide with respect to dependent territories

THE GENERAL ASSEMBLY recommends that Parties to the Convention on the Prevention and Punishment of the Crime of Genocide which administer dependent territories, should take such measures as are necessary and feasible to enable the provisions of the Convention to be extended to those territories as soon as possible.

2

INTERNATIONAL COURT OF JUSTICE AND INJURIES INCURRED IN THE SERVICE OF THE UNITED NATIONS

The International Court of Justice has decided that the oral procedure on the question of injuries incurred in the service of the United Nations should begin on March 8, 1949. Written comments will have to be submitted to the Court by February 14.

The above question was referred to the Court by the recent General Assembly with a request for an advisory opinion on the following legal problems:

I. 'In the event of an agent of the United Nations in the performance of his duties suffering injury in circumstances involving the responsibility of a State, has the United Nations, as an Organisation, the capacity to bring an international claim against the responsible *de jure* or *de facto* Government with a view to obtaining the reparation due in respect of the damage caused (a) to the United Nations, (b) to the victim or to persons entitled through him ?'

II. 'In the event of an affirmative reply on point I(b) how is action by the United Nations to be reconciled with such rights as may be possessed by the State of which the victim is a national ?'

The relevant General Assembly resolution (A/C.6/294) expressly referred to the series of tragic events which have lately befallen agents of the United Nations engaged in the performance of their duties and then dealt with the question of the arrangements that are necessary to ensure to United Nations agents the fullest measure of protection.

3

CONVENTION

RELATIVE AU RÉGIME DE LA NAVIGATION SUR LE DANUBE

Beograd, 1948

L'Union des Républiques Soviétiques Socialistes, le Royaume-Uni de Grande Bretagne et d'Irlande du Nord, les Etats-Unis d'Amérique, la République Française, la République Populaire de Bulgarie, la République Tchécoslovaque, la République de Hongrie, la République Populaire Roumaine, la République Soviétique Socialiste d'Ukraine et la République Fédérative Populaire de Yougoslavie.

Prenant en considération la décision du Conseil des Ministres des Affaires Etrangères du 12 Décembre 1946 de convoquer une Conférence de Représentants des Etats ci-dessus mentionnés en vue d'établir une nouvelle Convention relative au régime de la navigation sur le Danube et

Désireux d'assurer la libre navigation sur le Danube en conformité avec les intérêts et les droits souverains des pays danubiens, ainsi que de resserrer les liens économiques et culturels des pays danubiens entre eux et avec les autres pays,

Ont décidé de conclure une Convention relative au régime de la navigation sur le Danube et ont, à ces fins, désigné les Plénipotentiaires soussignés, lesquels, après présentation de leurs pleins pouvoirs, reconnus en bonne et due forme, sont convenus de ce qui suit:

CHAPITRE I. DISPOSITIONS GENERALES

Article 1

La navigation sur le Danube sera libre et ouverte aux ressortissants, aux bateaux marchands et aux marchandises de tous les Etats sur un pied d'égalité en ce qui concerne les droits de port et les taxes sur la navigation, ainsi que les conditions auxquelles est soumise la navigation commerciale. Les dispositions ci-dessus ne seront pas applicables au trafic entre les ports d'un même Etat.

Article 2

Le régime établi par la présente Convention s'applique à la partie navigable du Danube (fleuve) d'Ulm à la Mer Noire en suivant le bras de Soulina avec accès à la mer par le Canal de Soulina.

Article 3

Les Etats danubiens s'engagent à maintenir leurs secteurs du Danube en état de navigabilité pour les bâtiments fluviaux et en ce qui concerne les secteurs appropriés pour les bâtiments de mer, à exécuter les travaux nécessaires pour assurer et améliorer les conditions de navigation, et à ne pas empêcher ou entraver la navigation dans les chenaux navigables du Danube. Les Etats danubiens se consulteront sur les matières indiquées dans le présent article avec la Commission du Danube (art. 5 ci-après).

Les Etats riverains auront le droit d'entreprendre dans les limites de leurs frontières respectives les travaux qui pourraient être nécessités par des circonstances imprévues et urgentes et auraient pour but d'assurer les besoins de la navigation. Les Etats devront toutefois aviser la Commission des raisons qui ont motivé ces travaux et lui en fournir une description sommaire.

ARTICLE 4

Dans le cas où un Etat danubien ne serait pas en mesure d'entreprendre lui-même les travaux qui sont de sa compétence territoriale et qui sont nécessaires pour assurer la navigation normale, cet Etat sera tenu de les laisser exécuter par la Commission du Danube (art. 5) dans les conditions qu'elle déterminera et sans qu'elle puisse en confier l'exécution à un autre Etat, sauf en ce qui concerne les parties de la voie fluviale formant frontière d'un tel Etat. Dans ce dernier cas, la Commission déterminera les modalités de l'exécution de ces travaux.

Les Etats danubiens s'engagent à prêter à la Commission ou à l'Etat exécutant toute forme de concours à l'exécution desdits travaux.

CHAPITRE II. DISPOSITIONS RELATIVES A L'ORGANISATION

Section I. Commission du Danube

ARTICLE 5

Il est établi une Commission du Danube, désignée ci-après sous le nom de 'Commission'; elle est composée de représentants des pays danubiens, un pour chacun de ces pays.

ARTICLE 6

La Commission choisit parmi ses membres son président, son vice-président et son secrétaire qui sont élus pour une période de trois ans.

ARTICLE 7

La Commission fixe les termes de ses sessions et établit son Règlement intérieur.

La première réunion de la Commission sera tenue dans un délai de six mois à dater de l'entrée en vigueur de la présente Convention.

ARTICLE 8

La compétence de la Commission s'étend au Danube tel qu'il est défini à l'article 2.

Il entre dans les attributions de la Commission:

a) de veiller à l'exécution des dispositions de la présente Convention;

b) de dresser, sur la base des propositions et des projets présentés par les Etats danubiens et par les Administrations fluviales spéciales (art. 20 et 21), le plan général des grands travaux dans l'intérêt de la navigation, ainsi que d'établir l'évaluation générale des dépenses concernant ces travaux;

c) d'exécuter des travaux, dans les cas prévus à l'article 4;

d) de donner des consultations et de faire des recommandations aux Etats danubiens au sujet de l'exécution des travaux visés au paragraphe ' b ' du présent article, en tenant compte des intérêts techniques et économiques, des plans et des possibilités des Etats respectifs;

e) de donner des consultations et de faire des recommandations aux Administrations fluviales spéciales (arts. 20 et 21) et de procéder à un échange d'informations avec ces Administrations;

f) d'établir sur tout le parcours navigable du Danube un système uniforme d'aménagement des voies navigables et de fixer, compte tenu des conditions spécifiques de tel ou tel secteur, les dispositions fondamentales relatives à la navigation sur le Danube, y compris celles du service de pilotage;

g) d'unifier les règles de la surveillance fluviale;

h) de coordonner l'activité des services hydrométéorologiques sur le Danube, de publier un bulletin hydrologique unique et des prévisions hydrologiques de courte et de longue durée pour le Danube;

i) de rassembler les données statistiques relatives à la navigation sur le Danube, pour autant qu'il s'agit de questions qui sont de la compétence de la Commission;

j) de faire publier, pour les besoins de la navigation, des ouvrages de référence, des routiers, des cartes de navigation et des atlas;

k) de préparer et d'approuver le budget de la Commission, ainsi que d'établir et de percevoir les taxes prévues à l'article 10.

Article 9

Pour s'acquitter des tâches visées à l'article précédent, la Commission dispose d'un Secrétariat et des services nécessaires dont le personnel est recruté parmi les citoyens des Etats danubiens.

Il appartient à la Commission elle-même d'organiser son Secrétariat et ses services.

Article 10

La Commission prépare son budget et l'approuve à la majorité des voix de tous ses membres. Le budget doit prévoir les dépenses nécessaires à l'entretien de la Commission et de son appareil; ces dépenses seront couvertes au moyen d'annuités versées par les Etats danubiens, à raison d'un montant égal pour chacun d'eux.

Pour faire face aux frais des travaux spéciaux, exécutés en vue d'assurer ou d'améliorer les conditions de navigabilité, la Commission pourra établir des taxes spéciales.

Article 11

Les décisions de la Commission sont prises à la majorité des voix des membres présents, sauf dans les cas spécialement prévus par la présente Convention (arts. 10, 12, et 13).

Le quorum de la Commission est de cinq membres.

ARTICLE 12

Les décisions de la Commission relatives aux questions prévues par les paragraphes b), c), f), g) de l'article 8. doivent être prises à la majorité des voix de tous les membres, sans toutefois majoriser l'Etat sur le territoire duquel les travaux doivent être exécutés.

ARTICLE 13

La Commission a son siège à Galatz.

Elle peut toutefois, par une décision prise à la majorité des voix de tous ses membres, changer le lieu de son siège.

ARTICLE 14

La Commission jouit de la personnalité juridique conformément à la législation de l'Etat du lieu de son siège.

ARTICLE 15

Le français et le russe sont les langues officielles de la Commission.

ARTICLE 16

Les membres de la Commission et les fonctionnaires mandatés par elle jouissent de l'immunité diplomatique. Les locaux officiels, les archives et les documents de toute espèce appartenant à la Commission sont inviolables.

ARTICLE 17

Les fonctionnaires de la Commission munis de pouvoirs appropriés informeront les autorités compétentes des Etats danubiens des infractions aux règlements de navigation, aux mesures sanitaires et à la surveillance fluviale dont la Commission aurait pris connaissance. Les autorités compétentes seront tenues, à leur tour, d'informer la Commission des mesures prises au sujet des infractions notifiées et mentionnées ci-dessus.

ARTICLE 18

Le Commission a son sceau; elle a également son pavillon qu'elle a le droit d'arborer sur ses locaux officiels et les bateaux.

ARTICLE 19

Les Etats danubiens sont tenus de prêter à la Commission ainsi qu'à ses fonctionnaires et son personnel le concours nécessaire à l'exécution des tâches leur incombant en vertu de la présente Convention.

Ces fonctionnaires et ce personnel auront, dans l'exercice de leurs fonctions officielles, le droit de circuler librement sur le fleuve et dans les ports, dans les limites de la juridiction de la Commission, à condition de respecter la législation territoriale.

Section II. Administrations Fluviales Spéciales

Article 20

Sur le bas Danube (de l'embouchure du Canal de Soulina à Braila inclusivement) il est établi une Administration fluviale spéciale en vue d'exécuter des travaux hydrotechniques et de régler la navigation; elle est composée de représentants des Etats riverains adjacents (la République Populaire Roumaine et L'Union des République Soviétiques Socialistes).

Cette Administration fonctionne sur la base d'un accord entre les gouvernements des pays qui en font partie.

L'Administration a son siège à Galatz.

Article 21

Sur le secteur des Portes de Fer (de Vince à Kostol sur la rive droite et de Moldova Veche à Turnu-Severin sur la rive gauche du Danube) il est établi une Administration fluviale spéciale des Portes de Fer; cette Administration est composée de représentants de la République Populaire Roumaine et de la République Fédérative Populaire de Yougoslavie; elle a pour tâche d'exécuter des travaux hydrotechniques et de régler la navigation dans la zone indiquée.

Cette Administration fonctionne sur la base d'un accord entre les Gouvernements des pays qui en font partie.

L'Administration a son siège à Orsova et à Tekija.

Article 22

Les accords relatifs aux Administrations fluviales spéciales (ci-après désignées sous le nom d' 'Administrations '), mentionnés aux articles 20 et 21, sont portés à la connaissance de la Commission.

CHAPITRE III. REGIME DE LE NAVIGATION

Section 1. Navigation

Article 23

La navigation sur le bas Danube et dans le secteur des Portes de Fer s'effectue conformément aux règles de navigation établies par les Administrations des zones indiquées. La navigation sur les autres secteurs du Danube s'effectue conformément aux règles établies par les pays danubiens respectifs, dont le territoire est traversé par le Danube et, dans les zones où les rives du Danube appartiennent à deux Etats différents, d'après les règles établies d'un commun accord entre ces Etats.

En établissant les règles de navigation, les Etats danubiens et les Administrations tiennent compte des dispositions fondamentales relatives à la navigation sur le Danube, établies par la Commission.

ARTICLE 24

Les bâtiments naviguant sur le Danube ont le droit, à condition de se conformer aux règles établies par les Etats danubiens respectifs, d'entrer dans les ports, d'y procéder à des opérations de chargement et de déchargement, d'embarquer et de débarquer des voyageurs et de s'approvisionner en combustible, se ravitailler etc.

ARTICLE 25

Le trafic local des voyageurs et des marchandises et le trafic entre les ports d'un même Etat ne sont ouverts à un pavillon étranger que conformément à la Réglementation nationale dudit Etat danubien.

ARTICLE 26

Les règlements sanitaires et de police en vigueur sur le Danube sont appliqués sans discrimination en raison du pavillon, du point de départ des bâtiments, de leur destination ou d'autres motifs.

Les fonctions de surveillance douanière, sanitaire et fluviale sur le Danube, sont remplies par les Etats danubiens; ceux-ci communiquent à la Commission les règlements qu'ils ont établi, afin que la Commission puisse contribuer à l'unification des règles de douane et des règles sanitaires et unifier les règles de la surveillance fluviale (Art. 8 ' g ').

Les règlements douaniers, sanitaires et de police doivent être de nature à ne pas entraver la navigation.

ARTICLE 27

Lorsque les deux rives du Danube font partie du territoire d'un même Etat, cet Etat a le droit de mettre les marchandises en transit sous scellés ou sous la garde d'agents des douanes. Un tel Etat a également le droit d'exiger du capitaine, de l'armateur ou du patron une déclaration écrite attestant seulement qu'il transporte ou qu'il ne transporte pas des marchandises dont l'importation est prohibée par l'Etat transité, sans avoir toutefois le droit d'en interdire le transit. Ces formalités ne pourront impliquer ou occasionner ni une visite de la cargaison ou retarder le passage en transit. Le capitaine, l'armateur ou le patron qui aurait fait une fausse déclaration en sera responsable conformément aux lois de l'Etat auquel la déclaration aurait été faite.

Lorsque le Danube forme frontière entre deux Etats, les bateaux, radeaux, voyageurs et marchandises en transit sont exempts de toutes formalités douanières.

ARTICLE 28

Les bâtiments affectés par les Etats danubiens au service de la surveillance (police) fluviale sont tenus d'arboier, en plus de leur pavillon national, un insigne distinctif et uniforme; leurs signalement et numéro doivent être portés à la connaissance de la

Commission. Ces bâtiments, de même que ceux affectés au service des douanes des pays danubiens, peuvent naviguer sur le Danube uniquement à l'intérieur des frontières des pays dont le bâtiment bat le pavillon et au dehors desdites frontières qu'avec le consentement des Etats danubiens respectifs.

Article 29

Les bâtiments naviguant sur le Danube peuvent se servir des stations de TSF qui ce trouvent à leur bord ainsi que de moyens de communication riverains dont ils auraient besoin dans des buts de navigation.

Article 30

La navigation sur le Danube est interdite aux bâtiments de guerre de tous les pays non-danubiens.

Les bâtiments de guerre des pays danubiens ne peuvent pas naviguer sur le Danube hors des frontières du pays dont le bâtiment bat le pavillon, sauf entente préalable entre les Etats danubiens intéressés.

Section II. Service de Pilotage

Article 31

Des corps de pilotes sont formés sur le bas Danube et dans le secteur des Portes de Fer; ils dépendent des Administrations respectives (art. 22).

Les règlements du service de pilotage sont établis par les Administrations conformément aux dispositions fondamentales concernant la navigation sur le Danube (art. 8. f.), et doivent être portés à la connaissance de la Commission.

Article 32

Le pilotage des bâtiments sur le bas Danube et dans le secteur des Portes de Fer est assuré par des pilotes faisant partie des corps de pilotes respectifs ou bien par des pilotes qui, ayant subi un examen auprès des services de l'Administration fluviale compétente, seraient autorisés per cette Administration à exercer le pilotage.

Article 33

Le personnel des corps de pilotes est recruté parmi les citoyens des pays danubiens membres des Administrations respectives. Le mode de recrutement est établi par des accords spéciaux passés entre les membres ci-dessus mentionnés (arts. 20 et 21) de ces Administrations.

CHAPITRE IV. MODALITES DE COUVERTURE DES DEPENSES NECESSAIRES POUR ASSURER LA NAVIGATION

ARTICLE 34

Le financement des travaux hydrotechniques sur le Danube, exécutés par les pays danubiens, conformément à l'article 3 de la présente Convention, est assuré par les pays danubiens respectifs.

Le financement des travaux prévus à l'article 8 c) est assuré par la Commission.

ARTICLE 35

Afin de couvrir les dépenses nécessaires pour assurer la navigation, les Etats danubiens peuvent, après s'être concertés avec la Commission, établir des droits de navigation perçus sur les bâtiments et dont le taux est déterminé en fonction du coût de l'entretien de la voie fluviale et des travaux prévus à l'article 34.

ARTICLE 36

Afin de couvrir les dépenses nécessaires pour assurer la navigation et l'exécution des travaux entrepris par les Administrations, celles-ci établissent des taxes particulières perçues sur les bâtiments naviguant dans les secteurs compris entre l'embouchure du Canal de Soulina et Braila et entre Vince et Kostol sur la rive droite et entre Moldova Veche et Turnu-Severin sur la rive gauche du Danube.

Les Administrations informent la Commission des taxes particulières qu'elles ont établies, ainsi que des modalités de leur perception.

ARTICLE 37

Les sommes produites par les taxes spéciales, les droits de navigation et les taxes particulières perçues par la Commission, par les Etats danubiens et par les Administrations ne peuvent être une source de profit.

ARTICLE 38

Les modalités de perception des taxes spéciales, des droits de navigation et des taxes particulières sont fixées par des instructions élaborées respectivement par la Commission, les Etats danubiens et les Administrations. Les instructions émanant des Etats danubiens et des Administrations sont concertées avec la Commission.

Les taxes et les droits sont calculés sur le jauge du bâtiment.

ARTICLE 39

En ce qui concerne les parties du Danube formant frontière nationale, l'exécution des travaux et la répartition des dépenses encourues sont réglées par entente entre les Etats limitrophes respectifs.

Article 40

Les droits de port sont perçus sur les bâtiments par les autorités des Etats danubiens respectifs. Aucune discrimination ne sera admise à cet égard en raison du pavillon des bâtiments, au point de leur départ ou de leur destination ou d'autres motifs.

Article 41

Les bâtiments entrant dans les ports pour y charger ou décharger auront le droit de se servir des mécanismes de chargement et de déchargement, de l'outillage, des magasins, des terrains d'entrepôts etc., en vertu d'accords avec les services respectifs chargés du transport et de l'expédition.

Le montant des sommes à payer pour les services rendus sera établi sans aucune discrimination.

Les avantages accordés, conformément aux usages commerciaux, en raison du volume des travaux et de la nature des marchandises, ne seront pas considérés comme discrimination.

Article 42

Les bateaux, radeaux, voyageurs et marchandises ne peuvent être frappés d'aucun droit du seul fait de leur transit.

Article 43

Les tarifs des taxes de pilotage sur le bas Danube et dans le secteur des Portes de Fer sont établis par les Administrations respectives et communiqués à la Commission.

CHAPITRE V. DISPOSITIONS FINALES

Article 44

Dans la présente Convention les termes ' Etat danubien ' ou ' pays danubien ' désignent un Etat dans le territoire duquel est comprise au moins une rive du Danube tel qu'il est défini à l'article 2.

Article 45

Tout différend entre les Etats signataires de la présente Covention au sujet de l'application ou de l'interprétation de cette Convention qui n'aurait pas été réglé par voie de négociations directes sera, à la demande d'une des parties au différend, soumis à une commission de conciliation composée d'un représentant de chaque partie et d'un tiers membre désigné par le Président de la Commission du Danube parmi les citoyens d'un Etat qui n'est pas partie au différend et, dans le cas où le Président de la Commission serait citoyen d'un Etat partie au différend, par la Commission du Danube.

La décision de la commission de concilation est définitive et obligatoire pour les parties au différend.

ARTICLE 46

La présente Convention pourra être révisée sur la demande de la majorité des Etats signataires. Cette demande sera adressée au Gouvernement de la République Fédérative Populaire de Yougoslavie qui provoquera dans le plus bref délai, la réunion d'une Conférence à laquelle tous les Etats signataires seront invités à participer. Les dispositions révisées n'entrent en vigueur qu'après le dépôt des instruments de ratification de six des Etats signataires de la présente Convention.

ARTICLE 47

La présente Convention, y compris les annexes, dont les textes français et russe font foi, devra être ratifiée et entrera en vigueur après le dépôt de six instruments de ratification. Les instruments de ratification seront déposés près le Gouvernement de la République Fédérative Populaire de Yougoslavie, dans les archives duquel sera déposé l'exemplaire authentique de la présente Convention.

Le Gouvernement de la République Fédérative Populaire de Yougoslavie remettra à chacun des Etats signataires de la Convention une copie certifiée conforme. Il informera les Etats signataires de la Convention du dépôt des instruments de ratification au fur et à mesure de leur réception.

LISTE DES ANNEXES

ANNEXE I.
De l'Admission de l'Autriche au sein de la Commission du Danube.
ANNEXE II.
Du Secteur Gabcikovo-Gönyü.

ANNEXE I

DE L'ADMISSION DE L'AUTRICHE AU SEIN DE LA COMMISSION DU DANUBE

1. Le Représentant de l'Autriche sera admis au sein de la Commission du Danube après règlement de la question du Traité avec l'Autriche.

2. La présente Annexe entrera en vigueur en même temps que la Convention relative au régime de la navigation sur le Danube et sera partie intégrante de cette Convention.

ANNEXE II

DU SECTEUR GABCIKOVO-GÖNYÜ

En ce qui concerne les travaux nécessaires pour assurer les conditions normales de navigation dans le Secteur GABCIKOVO-GÖNYÜ (du km. 1821 au km. 1791), les Parties Contractantes sont d'accord pour reconnaître qu'il est d'intérêt général de maintenir

ce secteur en bon état de navigabilité et que les travaux nécessaires à cette fin dépassent de loin ceux qu'on peut raisonnablement mettre à la charge des États riverains compétents.

Par conséquent, il est convenu que la Commission du Danube discutera la question et décidera si, dans ce but, il serait approprié de créer une Administration fluviale spéciale semblable à celles prévues aux articles 20 et 21 ou s'il serait suffisant d'appliquer à ce secteur les stipulations des articles 4 et 34 (alinéa 2) de la présente Convention.

Des dispositions analogues à l'article 20 de la présente Convention, dont cette annexe est partie intégrante, s'appliqueront au cas où une Administration est établie.

En foi ce quoi, les Plénipotentiaires soussignés ont signé la présente Convention et y ont apposé les cachets.

Fait en la ville de Beograd le . . . mil neuf cent quarante huit.

PROTOCOLE ADDITIONNEL A LA CONVENTION RELATIVE AU REGIME DE LA NAVIGATION SUR LE DANUBE SIGNE

A Beograd le . . . 1948

1. Il est constaté que le régime appliqué antérieurement à la navigation sur le Danube, ainsi que les actes qui prévoyaient l'établissement de ce régime et, en particulier, la Convention signée à Paris le 23 juillet 1921, ne sont plus en vigueur.

2. Tous les biens ayant appartenu à l'ancienne Commission Européenne du Danube sont transférés à l'Administration fluviale spéciale sur le Bas-Danube créée conformément à l'article 20 de la Convention à laquelle se rapporte le présent Protocole.

3. Il est convenu que toutes les obligations de l'ancienne Commission Européenne du Danube concernant le remboursement des crédits qui lui ont été accordés par la Grande Bretagne, la France, la Russie et d'autres Etats sont considérées comme éteintes.

4. Les obligations de l'ancienne Commission Internationale du Danube, de même que les obligations de l'ancienne Administration des Portes de Fer et des Cataractes, ainsi que les garanties y afférentes sont considérées comme éteintes.

5. Les biens non liquidés de l'ancienne Commission Internationale du Danube sont transférés à la Commission du Danube prévue à l'article 5 de la Convention à laquelle se rapporte le présent Protocole. La partie des biens de l'ancienne Commission Internationale du Danube, mise à la disposition de l'ancienne Administration des Portes de Fer et des Cataractes et tous les biens de l'ancienne Administration des Portes de Fer et des Cataractes sont transférés à l'Administration fluviale spéciale des Portes de Fer créée conformément à l'article 21 de la Convention à laquelle se rapporte le présent Protocole.

Fait en la ville de Béograd le . . . 1948.

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